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Responding to Employee Absenteeism

Presented by:

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I. **Teacher Absenteeism: Is Attendance "Optional" in Public Schools?**

A. **The Facts**

About one third of public school teachers in the United States are absent more than 10 days in a typical 180-day school year.¹ In other words, between kindergarten and 12th grade, a typical student is taught by someone other than the regularly assigned teacher for the equivalent of at least two-thirds of a school year. Students experience teacher absence in bursts of time, ranging from a few hours to a few months, and this fractured exposure may help deflect policymakers' attention. Yet there are three good reasons to revisit policies around teacher absence²:

1. **Teacher absence is expensive:** With 5.3 percent of teachers absent on a given day, stipends for substitute teachers and associated administrative costs amount to \$4 billion, annually. *National Center for Education Statistics, Schools and Staffing Survey (2003-04 Public Schools)*.
2. **Teacher absence negatively affects student achievement:** Researchers have found that every 10 absences lowers mathematics achievement by the same amount as having a teacher with one year to two years of experience instead of a teacher with three years to five years of experience. Clotfelter, C.T., Ladd, H.F., and Vigdor, J.L. 2007. "*Are Teacher Absences Worth Worrying about in the U.S.?*" Cambridge: National Bureau of Economic Research.
3. **Teacher absence disproportionately affects low-income students:** Students in schools serving predominantly low-income families experience teacher absence at higher rates than students in more affluent communities. Part of the achievement gap is thus due to a teacher attendance gap. Clotfelter, C.T., Ladd, H.F., and Vigdor, J.L. 2007. "*Are Teacher Absences Worth Worrying about in the U.S.?*" Cambridge: National Bureau of Economic Research.
4. **Larger school districts show even greater issues:** The National Council on Teacher Quality (NCTQ), using data from 40 large school districts across the country from the 2012-2013 school year found that, on average, teachers missed nearly 11 days out of a 186-day school year. 16% of those teachers missed 18 or more days, nearly 10% of the school year. Cleveland (15.6 days) and Columbus (14.8) were among the highest averages of the 40 schools surveyed.

¹ Toppo Greg, *Teacher Absenteeism*, USA TODAY, <http://www.usatoday.com/story/news/nation/2013/02/12/teacher-absenteeism-puts-students-at-a-loss/1914515>, February 12, 2013.

² Miller, Raegen, *Tales of Teacher Absence: New Research Yields Patterns that Speak to Policy Makers*, www.americanprogress.org, October 2008.

5. **The Center for American Progress:** Released data from 2009 showing that, on average, 36% of teachers nationally were absent more than 10 days.

B. Why Does Teacher Absence Matter?

The direct financial costs of teacher absence are not trivial. Stipends for substitute teachers and associated administrative costs amount to \$4 billion, annually. This figure, which represents roughly 1 percent of federal, state, and local spending on K–12 public education, represents an untapped resource. Combinations of incentives could reduce levels of teacher absence enough to pay for themselves. In fact, creative local examples of this kind of thinking have yielded net financial savings.

1. Teachers in Aldine, Texas, for example, receive a bonus for excellent attendance. Savings that result from paying fewer stipends to substitutes more than offset the cost of the bonuses, netting the district \$5 per student per year.
2. The right kind and/or combination of policies could free-up part of this \$4 billion to meet other needs while reducing students' exposure to teacher absence.
3. However, current policies are apparently not working, and the NCTQ study referenced previously concluded that "Districts with formal policies in place to discourage teacher absenteeism did not appear to have better attendance rates than those with such policies, suggesting that the most common policies are not particularly effective."

C. What Causes Teacher Absence

On average, 5.3 percent of public school teachers in the United States are absent on a given day.³ A variety of factors leads to increased absence rates:

1. Female teachers and those who have longer commutes tend to be absent more often;
2. Teachers with a middle range of experience;

³ *The School and Staffing Survey* (SASS), administered by the National Center for Education Statistics, supports the construction of a national rate of teacher absence: the ratio of short-term substitutes to full-time equivalent teachers on a given day.

3. School environment (elementary schools, larger schools, and higher-poverty schools tend to have higher teacher absence rates);
4. Frequent exposure to sick children; and
5. **Teachers are more likely to have more absences if their colleagues are absent more often.**

Yet, some research shows that teacher absence behavior may be related to policies and susceptible to incentives. Teachers are absent more frequently when their contracts furnish them more days of paid leave for illness or personal reasons.⁴ Ohio's 15 days of annual sick leave is on the high end of the spectrum, nationally.

They are absent less often when bonuses are given for exceptionally high attendance or schemes in which districts buy back unused sick leave.⁵

Teachers respond to changes in absence-control policies. For example, teachers who are required to report absences directly to their principal by telephone are absent less often than teachers using impersonal reporting systems.⁶ *These insights show that while causes are multi-dimensional, policymakers do have the power to reduce absence rates.*

The critical issue is defining the right policies. Stated another way, are current policies merely rewarding those who don't need an incentive?

⁴ Ehrenberg, R.G., Ehrenberg, R.A., Rees, D.I., and Ehrenberg, E.L. 1991. "School District Leave Policies, Teacher Absenteeism, and Student Achievement." *Journal of Human Resources* 26 (1): 72–105; Winkler, D.R. 1980, "The Effects of Sick-Leave Policy on Teacher Absenteeism," *Industrial & Labor Relations Review*, vol. 33, no. 2, pp. 232–40.

⁵ *Id.*; Freeman, R., and Grant, F. 1987. "How We Increased Staff Attendance by 16 Percent and Saved \$156,000." *American School Board Journal* 174 (2): 31; Jacobson, S.L. 1990. "Attendance Incentives and Teacher Absenteeism." *Planning and Changing* 21 (2): 78–93; Skidmore, D.E. 1984, "We Used These Few Simple Steps to Cut Teacher Absenteeism in Half--And Increased Productive Class Time and Community Support in the Bargain," *American School Board Journal*, vol. 171, no. 3, pp. 40–41; White, N.A. 1990. "Cut Sick-Pay a Day: An Incentive Plan To Reduce Teacher Absenteeism," Fort Lauderdale: Nova Southeastern University.

⁶ Farrell, D., and Stamm, C. 1988. "Meta-analysis of the Correlates of Employee Absence." *Human Relations* 41 (3): 211–227; Winkler, D.R. 1980, "The Effects of Sick-Leave Policy on Teacher Absenteeism," *Industrial & Labor Relations Review*, vol. 33, no. 2, pp. 232–40.

II. Effectively Responding to Excessive and/or Inappropriate Employee Absenteeism:

- A. Are We Enabling the Problem?:** The difficulties faced by public schools in their quest to meet state and federal standards, while attempting to satisfy the increasing expectations of their constituent voters, parents, community members and students, are only exacerbated by the persistent problem of employee absenteeism. While there are a number of root causes for absenteeism in public education, the stark reality is that our systems have often permitted the problem to persist – if not unwittingly.

Because of the perception of school employees to an entitlement to absent themselves from the workplace without explanation or recourse has become so institutionalized, the question that is begged is whether or not the necessary commitment to accountability in this area is worth the effort? The authors hope to provide assistance in answering that question through a discussion of the relevant dynamics involved in addressing absenteeism.

- B. Gauging the Operational Impact and Cost of Employee Absence:** While most employees are not guilty of the illegitimate or inappropriate use of leave (and districts do not want sick employees to come to school and get other individuals sick), the number of those abusing leave rights is significant enough to cause systemic and operational concerns, including:

1. Locating sufficient and qualified substitutes.
2. The additional costs attendant to hiring substitutes. It is estimated that districts spend approximately 2% of their total operating budgets on substitute teachers, alone, on an annual basis.
3. Operational consistency (eg., transportation, maintenance, etc.).
4. Increased overtime pay for employees covering for absent co-workers.
5. Administrative and supervisory time diverted from district goals by responding, instead, to employee absenteeism and its side effects.
6. Supervisor time spent performing absent employee functions.
7. The negative impact excessive and/or illegitimate use of leave has on overall employee morale – particularly among those who routinely “play by the rules.”

8. Legal fees generated by pursuing wrongdoers and enforcing the rules. Employee groups often resist any effort at enforcement of disciplinary sanction for absent employees, resulting in grievance arbitrations, unfair labor practices, etc.
9. Instructional continuity and meaningful academic instruction suffers since students are best served when the teachers of record are in attendance on a daily basis.
10. There is a resulting negative impact on the learning environment since substitutes may not be able to respond as effectively to student academic needs and/or disciplinary issues.
11. The overall additional costs associated with health and workers' compensation insurance premiums.

C. The Primary Objective – the Establishment of an Environment of Fairness and Accountability: Employee absenteeism cannot be viewed in a vacuum and is but one of a number of challenges faced by districts in this age of accountability. In order to be able to address this issue, there must be an overall commitment to the establishment and maintenance of a positive working environment. Simply stated, employees are less likely to abuse leave time when they feel a part of a healthy and positive workplace. This can only be achieved where there is an overall consensus in a district on the expectations for employees (What is my role? How am I expected to contribute?), coupled with consistency and systemic fairness in confronting disciplinary problems.

1. Administrators must embrace the district's commitment to excellence and accountability – and they must be held accountable as well.
2. The enforcement of fair and equitable rules relating to attendance will face less “friction” in an atmosphere of trust where there are no surprises in the consistent application of district-wide expectations.

D. Step One – Perform an Attendance “Audit”: The first step is to understand and assess the nature and extent of the problem in a particular district by identifying the following:

1. What are the actual financial costs associated with employee absenteeism?
2. Are there differing rates of absenteeism within the employee ranks?

3. Does absenteeism have a pattern – by individuals, groups or school building?
4. What expectations have developed through district practices concerning absenteeism?
5. How does the language of the collective bargaining agreements contribute to the problem?
6. How does absenteeism impact student achievement and conduct?
7. Do administrators and other supervisors reference absenteeism in employee performance evaluations?

E. Revisit the Basics: The next step is to redouble efforts to understand and become reacquainted with the legal framework for legitimate employee absences – this will serve to bring into focus the variations and expansions of absence opportunities that have occurred in the all-important collective bargaining agreements. (See materials which follow, below). In particular, all administrative employees should be trained and provided with the necessary support to effectively deal with illegitimate employee absenteeism. In addition to being supported in their efforts to prevent absenteeism, administrators must be held accountable when they do not.

F. Be Proactive: Once a full understanding of available leave options under the contract and/or law has been obtained, the move toward enhanced accountability can be accomplished as follows:

1. Establish a list of leave priorities for negotiations and prepare to make needed language changes in the collective bargaining agreements. (See Section II, below).
2. Prepare to effectively repudiate and end any unacceptable binding “past practices” relative to leaves.
3. Resolve to diligently pursue the illegitimate use of leave through:
 - a. The development of district-wide communications of your intent to enforce the rules and maintain a stable workforce.

- b. Engaging in the consistent enforcement of the leave provisions – whether or not there is employee or union resistance. This includes defending actions through the grievance process to arbitration if necessary.
 - c. Commitment of resources – up to and including the use of private investigation services – in pursuit of known and/or suspected leave abusers.
 - d. Careful and thorough documentation of employee absences and patterned absences. This may include tracking of excessive absenteeism through school district databases by:
 - (1) Number of days per year – comparing current school year with previous school years;
 - (2) Patterns such as Mondays, Fridays, paydays, work days prior to holidays, and/or the same days each year; and
 - (3) Noting whether personal days frequently coincide with sick days.
 - e. Utilization of any and all administrative tools under law and/or the collective bargaining agreement (i.e., required doctor excuses, disqualification from overtime, etc.).
 - f. Enforcing a call-in system that requires an employee to speak directly with his/her supervisor instead of leaving a message with another employee or on voicemail. If an employee is required to speak directly to a principal or other supervisor to report an impending absence, s/he may be less likely to absent himself/herself from the workplace.
4. Make attendance a factor in the employee’s performance evaluation and include a comment about attendance on each performance evaluation. Specifically, take action to address attendance problems in performance evaluations and avoid union efforts to place contract restrictions on this basic management right. Conversely, include positive comments regarding good attendance by employees.

5. When interviewing applicants for positions, review the candidate's attendance record and ask specific questions concerning absenteeism. Also, identify attendance as a performance expectation and include it as a "qualification" on job descriptions.
6. Intervene promptly with employees demonstrating excessive absenteeism:
 - a. Provide the employee with the objective data concerning attendance.
 - b. Ask the employee what can be done to improve attendance. Emphasize the need for the employee's regular attendance and the benefit to students and the work environment.
 - c. Document the meeting and continue to monitor and document attendance.
 - d. Be prepared to address union arguments that management has no right to inquire about the use of "earned" accrued sick leave. However, if an employee indicates that his/her absences are due to a medical problem or that s/he is providing primary care to a family member with a medical problem, the school district may want to consider implications under the FMLA (or ADA).
 - e. Be aware of privacy and HIPAA concerns – while medical certification submitted directly by an employee is an employment record, not a HIPAA covered document, the document still must be kept confidential in accordance with the ADA (See chart in Appendix I).
 - f. Consider referring employees to the District's employee assistance program for excessive absenteeism and/or patterns of leave use (e.g., employees are consistently absent on Mondays, Fridays, pay days), particularly since employee absenteeism may be due to alcoholism, family problems, domestic abuse, etc.
 - g. When warranted, consider utilizing the services of a private investigator. However, discuss such services with the Superintendent and board legal counsel prior to unleashing the private investigator.

7. **Don't Forget the Reporting Obligations for Licensed Employees.** Under recent legislation, it is now clear that licensed employees must accurately report information relating to their absences and it is “conduct unbecoming” the teaching profession to falsify, intentionally misrepresent, willfully omit, or negligently report reasons for absences or leaves. As such, if the Board moves to terminate or non-renew a licensed employee – in whole or in part – for such conduct, the Superintendent (or Treasurer where the employee has been designated by the Board to report to the Treasurer) must report this to the state department. Reporting must also occur if a licensed employee resigns in the face of an investigation for fraudulent leave.

III. The Collective Bargaining Agreement – an Effective Tool in the Battle Against Absenteeism

- A. **Prioritize Objectives for Upgrading Language in Collective Bargaining Agreements:** Once you have completed a comprehensive audit of your absenteeism “hot spots,” there must be buy-in by district stakeholders of the need to assess and revise ineffective contract language. While it is never easy to dislodge established contract language – particularly where, as here, it is perceived by employee groups as a “fringe benefit” or entitlement – it can be well worth the effort. Administrators should make it a practice to regularly document problem areas here in anticipation of negotiations.
- B. **Some Practical Suggestions for Developing Effective Contract Language:** The following represent some possible considerations for negotiating leave provisions:
 1. **Sick Leave**
 - a. **Immediate Family defined:** Develop a realistic definition of the immediate family (cousins, “alternative lifestyles?”) for purposes of identifying those individuals for whom employees may absent themselves to serve as a primary care-giver.
 - b. **Sick Leave Banks:** Seemingly, every district faces the emotional dilemma caused when a valued employee with a depleting sick leave accumulation faces a catastrophic illness or injury. At times like these, districts often make the decision to develop a sick leave donation program, with the rationale that the gifted leave is simply being harmlessly shifted from one employee to another. In reality, most donated leave will be from those employees whose accumulations will not be used and will therefore be lost upon

severance. Beyond this, the original intention of the sick leave bank is often perverted and thereafter becomes all too easily accessed by those whose regular intermittent use of sick leave has left them without enough paid leave to sustain an absence for a less-than-catastrophic illness or injury. (The message sent to some employees by the existence of a sick leave bank is that they can use their current sick leave accumulation with impunity knowing that the sick leave bank is available if there is a serious leave event). To that end, districts should consider the elimination of sick leave banks altogether. However, if utilized at all, these donation programs should remain in control of the administration and be limited:

- (1) to employees only (i.e., not to provide care for immediate family members);
- (2) for catastrophic illness/injury; and
- (3) not available to those who have engaged in excessive, patterned sick leave;
- (4) Example:

“Use of days from the Sick Leave Bank will be limited to catastrophic personal injury or long-term physical illness of the Bargaining Unit member only. A doctor's statement is required with the application in order to be considered. The Sick Leave Bank is not available for disability associated with the normal course of pregnancy and childbirth; however, medical complications which would otherwise qualify are not prohibited. Employees seeking donation of sick leave for complications due to pregnancy and/or childbirth must provide, if requested, detailed medical information in support of any sick leave donation request. Recuperation from surgeries or other procedures which could have otherwise reasonably been scheduled during school vacation periods will not qualify for Sick Leave Bank donation. Teachers whose sick leave has been depleted by intermittent use shall not qualify for this benefit. Sick Leave Bank members must use accumulated sick leave first before accessing days from the sick leave bank.”

- c. **Accumulation:** The total amount of sick leave that may be accumulated can play a role in the attendance of veteran employees who have reached a “capped” amount. As long as sick leave banks are eliminated or tightly controlled (above) and if severance is capped, raising the accumulation amount can be an acceptable strategy to enhance and encourage attendance. The risk in giving unlimited sick leave for older workers is that long term illnesses could end up costing the district more.
- d. **Appropriate Usage:** Consider prohibiting the use of sick leave for routine medical/dental visits, etc.
- “Routine doctor, dental and/or other health service provider visits which are not an emergency or related to a current illness or injury are not an appropriate use of sick leave. To the extent such appointments cannot be scheduled outside of the workday or work week, teachers are to utilize personal leave.”*
- e. **Require Verification for Continuing Sick Leaves:** Some districts have found it necessary and useful to require medical verification for absence due to illness extending or expected to extend beyond a certain number of days (eg, 3 or 5 days).
- “Certified/licensed staff members on sick leave or reasonably expected to be on sick leave for a duration of [three (3) or five (5)] or more days must, upon request, provide the Board with medical verification and information concerning the prospects of a return to work and will consent to a release for such purpose upon request.”*
- f. **Address Consequences:** There should be language clearly setting forth the disciplinary consequences for abuse or falsification.
- g. **Pregnancy:** The statute says that sick leave may be used for “pregnancy” without any further explanation. It is advisable to limit such use of sick leave to “illness or disability associated with pregnancy.”
- h. **Advancement of Sick Leave:** The sick leave statute (R.C. § 3319.141) has a specific provision granting non-teaching employees new to the district or those who have exhausted all accumulated sick leave, an entitlement to an advancement of “not less than five days of sick leave each year, as authorized by rules which each board shall adopt, to be charged against sick leave he

subsequently accumulates under this section.” Teachers are not mentioned in this statute, but another section of the Code (R.C. § 3319.08) mandates that teachers be paid for five days for “time lost due to illness or otherwise.” As such, districts should consider:

- (1) Setting a hard cap of five days for annual sick leave advancements.
- (2) Ending any expectation that advancements are without end and setting forth possible consequences when sick leave and advancements are exhausted.
- (3) Example:

“Each teacher who has exhausted or each newly employed teacher who has not accumulated sick leave days shall be credited with five (5) days of sick leave. If any of these five (5) days of sick leave are used, they shall be deducted from any sick leave accumulated. Any advance is to be repaid by the teacher’s subsequent sick leave accrual within the contract year of the advancement. Advancements shall immediately be deducted from future accumulations and/or deducted from the employee’s final check if the employee is no longer employed with the Board and has not accumulated enough for repayment of said advancement(s). Nothing herein shall be considered to create an expectation that unpaid leave will be granted to any bargaining unit member who has exhausted all sick leave and advancements nor is the Board in any way limited from docking any such employee’s pay and/or in taking appropriate disciplinary action for any unauthorized absence without approved leave.”

2. **Personal Leave**

- a. **Stemming the Tide of Entitlement:** There is no statutory entitlement to personal leave for teachers. Likewise, boards may control the reasons for usage for non-teaching employees (if not, they become “unrestricted”) under R.C. §3319.142 (less so for city districts under R.C. § 124.386). Despite these legal parameters, most boards have enacted generous personal leave policies in their labor contracts for both employee groups. Consequently, “unrestricted” personal leave has become an expectation of

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employees and the expansion of these days is a priority for unions. In addition, since most personal day provisions expire at the end of the year, there is a “use it or lose it” mentality with some employees. For example, many districts report the widespread use of personal leave in the month of May.

b. **Contract Issues:** Consider giving these issues renewed attention in labor contracts:

- (1) Remove the concept of “unrestricted” personal leave days altogether – instead, these days should be re-titled as “emergency personal business leave” and restricted to circumstances wherein absence is unavoidable and a personal business necessity.
- (2) Limit this leave to those personal business matters that cannot be performed during non-work hours.
- (3) Require advanced notification and forms which require the employee to provide a legitimate explanation for the need to be absent.
- (4) Resist continuing efforts to expand the scope and amount of this leave.
- (5) Closely monitor personal leave usage.
- (6) If you cannot restrict the reasons for the use of personal leave, at least consider limiting the times/dates when such leave can be used (i.e., not before or after holiday or non-school days, Friday/Monday, first and last month/week of school, etc.). Also, place a hard “cap” on the number of bargaining unit members who can be out on any day for this kind of leave.

3. **“Parental” and Adoption Leave**

- a. **The Problem:** Many agreements (particularly teacher contracts) have excessively generous parental leave provisions that allow for years of unpaid leave ostensibly to permit absence for child-rearing purposes. Beyond the six (6) week period generally recognized for maternity leave, there is no statutory requirement to extend this leave. Many of these provisions were originally drafted (and then expanded) at times when there was either a shortage of teachers or

a fear of the same. The difficulty now is that teachers who utilize the extended leaves allowed under many agreements place strain on the educational system by requiring districts to place substitute “bookmark” employees in their stead. Some students have attended their entire elementary school years without having the same teacher for a full year and/or without having a full year with a “regular” teacher. (For instance, statistics demonstrate that within the K-12 experience, a student spends one full year with a substitute).

- b. **Set Reasonable Limits:** Employees should understand and appreciate the educational and operational needs of the district in restricting lengthy leaves of absence. Parental leave should be capped to prevent multiple years of absence and encourage a definitive commitment to a return to work date so as to provide the administration with scheduling flexibility and information necessary to meet the needs of student learners.
- (1) Require firm dates for return to work from parental leave events. Failure to return at the agreed upon time should serve as a resignation and allow the district to place a regular teacher into the vacant position.
 - (2) Avoid “floating” years, i.e., provisions that allow employees to take a year off at “any time before the child reaches the age of 6.”
 - (3) Conversely, restrict the use of parental leave for adoptions to children of tender years. Older adopted children will be in school during the academic year.
 - (4) Similarly, avoid the attempt to allow for the use of paid sick leave for adoptions (unless, of course, there is a qualifying illness of the child as an immediate family member).
 - (5) Get language allowing for “long-term” substitutes that allows for a “no-fault, no process” removal upon the return of an employee for long term leaves.

4. **Unpaid Leave and “Dock” Days – The Mythology of “Cruise” Leave**

a. **Understand the Law:** One of the great myths of employment in public education is that an employee may absent themselves indefinitely and nevertheless remain tethered to the district for a return to work at will even if they have exhausted all available leave. With the exception of certain employees out due to a workers compensation injury, it simply isn’t true. Employees who are AWOL (Absent Without Official Leave) are subject to termination on the basis of the abandonment of their position.

(1) Ohio Revised Code Section 3319.13 (see Appendix III) provides a board with the **discretion** to grant unpaid leaves for “educational, professional, or other purposes,” for a period of not more than two consecutive years, but does require the grant of such leave “where illness or disability is the reason for such **request**.”

(a) The statute is less than specific in defining its terms, but clearly is envisioning longer term unpaid leaves.

(b) Though undefined, employers have the right to assure that there exists an illness or disability to trigger the mandatory granting of the leave provision.

(2) “Upon subsequent **request**, such leave **may** be renewed by the board.” Clearly, a board is not required to continue any such unpaid leave beyond the length of the first request.

(a) As such, if an employee requests an unpaid leave and is granted same for a period less than two years – there is no obligation to allow for an extension.

(b) As discussed previously, without a request, the board may involuntarily place an employee on an unpaid leave “because of a physical or mental disability” as long as hearing rights equivalent to termination are provided under the appropriate statutes (either R.C. § 3319.16 for teachers or R.C. § 3319.081 for non-teaching employees).

b. **Eliminate Employee Expectations Concerning an Entitlement to “Dock” Days:** Boards and employee groups are free to bargain around the statutory framework and set forth their own procedures and criteria for when unpaid leave will be allowed. In any event, boards should consider the following concepts in negotiations:

- (1) Contract language that specifically eliminates any expectation that unauthorized absences will be granted in all circumstances:

“Uncompensated leave may be granted to a bargaining unit member only at the discretion of the Superintendent. Since such uncompensated leave is wholly discretionary, nothing herein shall create an expectancy that such leave will be granted, nor prevent the Board from taking appropriate disciplinary action for any unauthorized leave.”

- (2) Prior to negotiating this issue, assuming the existence of a binding “past practice” (i.e., where the district has consistently allowed employees to take dock days) the board should take measures to repudiate same in writing and invite the association to make proposals for inclusion in the contract.
- (3) Clearly set forth the consequences of unauthorized leave, i.e., that an employee may be terminated. If the decision is made to “dock” an employee’s pay for a first offense (and, perhaps, the cost of the substitute?), be sure to communicate that further such absences will result in immediate termination.
- (4) Restrict the use of any unpaid leave days:
- (a) to employees with a certain length of service (i.e., 5 years);
 - (b) employees who have not had excessive absences;
 - (c) limit the use of such days to once every 3-5 years per employee.

5. **Assault Leave:**

- a. Ohio Revised Code Section 3319.143 allows boards the **discretion** to adopt a policy of assault leave giving full pay status during periods of absence due to a physical disability resulting from an assault occurring in the course of employment. Boards may establish rules for the “entitlement, crediting, and use of assault leave” and such policy, if adopted, shall have prescribed forms for that purpose – the falsification of which is grounds for suspension or termination.
- b. If contract language provides this right, consider:
 - (1) Capping paid leave to 30 days or less.
 - (2) Requiring medical verification as a part of any application for assault leave.
 - (3) A mandatory provision that employees seeking assault leave must agree to cooperate in the investigation and prosecution of any wrongdoer causing the injury.

6. **Absences Relating to Teacher Evaluation/Non-renewal:** The Ohio Supreme Court has ruled that in the absence of overriding collective bargaining agreement language, teachers who are absent during required evaluation periods may not be non-renewed (see discussion below). Address this in the contract:

“Teachers on any long term leave of absence or extended sick leave whose limited contracts are to expire at the end of the year of the absence shall be deemed to have been properly evaluated under this Article and nothing herein shall prevent the Board from non-renewing such contracts.”

– or –

“If due to sick leave or other approved leave of absence, a teacher’s observation or evaluation timelines cannot be met, those timelines will be extended for a period equal to the length of the leave or absence due to illness.”

Relevant Case Law

- a. *Skilton v. Perry Local School District*, 102 Ohio St.3d 173 (2004)

Skilton was employed under a one year limited contract as a fourth grade teacher for the 1999-2000 school year. Her first evaluation was performed within the first three or four weeks of school. In October, 1999, Skilton was granted a one year unpaid medical leave of absence. In December, 1999, Skilton requested that she be reinstated as of January 19, 2000, and the Board agreed. However, Skilton then informed the Board that she could not return to work for the remainder of the year, and the Board allowed her to continue on leave. Less than five months after granting Skilton the one year paid medical leave, and without completing a second evaluation of Skilton, the Board decided to non-renew her limited contract. Skilton appealed the Board's decision to the court, alleging a violation of Revised Code 3319.11(E) and 3319.111(A) for not renewing her contract without completing a second evaluation. Board may terminate a teacher only as expressly permitted by statute. Here, limited contract teachers can be terminated without cause, but only if the school conducts a minimum of two evaluations of the teacher's performance.

The Court further held that the **teacher's medical leave of absence does not excuse a school board from complying with section 3319.111. In addition, section 3319.13 calls for a teacher to be returned to the same employment status following a leave of absence that the teacher held prior to leave.** The Court did not agree with the Board's argument regarding their inability to evaluate Skilton due to her absences, and stated that if section 3319.111 becomes too much of an obstacle, 3319.11 vests the trial court with discretion to determine whether to order re-employment. But in this case, the trial court did not abuse its discretion in ordering the re-employment of Skilton because the exercise of statutorily allotted leave of absence is not grounds for termination.

- b. *Milhoan v. Eastern Local School District*, 157 Ohio App.3d 716 (Ohio App. 4th Dist. 2004)

In this case, Milhoan was employed as a school bus driver with the District. Milhoan was employed under a two-year contract, expiring at the end of the 2003 school year. Milhoan had been absent most of the school year, exhausting his paid leave. Upon his written request, Milhoan was placed on an unpaid leave of absence. The absence, which was for medical reasons, was based on a non-work related injury. On May 20, 2003, the board voted to non-renew Milhoan's contract, and this decision was appealed to the court of common pleas. The court of common pleas dismissed the case for lack of jurisdiction, and Milhoan appealed. The major argument heard by the Court of Appeals centered around whether the driver enjoyed a property interest in his employment pursuant to Ohio Revised Code 3319.13 since he was on a leave of absence at the time he was non-renewed.

The Court of Appeals upheld the decision of the court of common pleas. **It determined that a nonteaching employee holds no property right to continued employment at the end of a limited contract, and there is no authority for the proposition that the board should stay an employee's contract until their return from a leave of absence.** Because Milhoan had no property interest in continued employment, he had no "rights" under which to appeal the board's decision.

The Court of Appeals further stated that the decision to nonrenew an employee is not the same as terminating an employee, and clearly distinguished this case from the decision in *Skilton* (discussed above). Unlike this case, *Skilton* involved a teacher, and primarily addressed the school's failure to comply with statutory evaluation procedures. Additionally, the decision of a board of education to nonrenew a nonteaching employee's contract does not require a hearing or the right to examine witnesses, and therefore is not a quasi-judicial proceeding.

Because the Court of Appeals found that Milhoan had no property right to continued employment, distinguished the case from the decision in *Skilton*, and held that the board's proceeding was not quasi-judicial as is required to appeal to the courts, it upheld the decision of the court of common pleas that there was no jurisdiction for the court to hear Milhoan's appeal.

c. ***Kuptz v. Youngstown City School District Board of Education, et al.*** 175 Ohio App. 3d 738 (2008)

Two teachers appealed the board's decisions not to renew their contracts. In the first case, the teacher was employed under a limited contract during the 2005-2006 school year. In accordance with law, the teacher was to be evaluated twice during the school year. Additionally, pursuant to the terms of the collective bargaining agreement between the district and the union, an "observation report" was required to be prepared after each evaluation. The evaluator was to hold a conference with the teacher within five workdays of the observation, and provide the teacher with a copy of the observation report during the meeting. Under the collective bargaining agreement, a "workday" was defined as "[a] day on which an employee is scheduled to work."

Although the teacher was observed for purposes of the evaluation on December 8, 2005, he was absent from work on the fifth workday after the observation (i.e., December 15, 2005). In light of his absence, the evaluator did not meet with the teacher until the following day on December 16, 2005. Thereafter, on April 25, 2006, the board voted not to renew the teacher's limited contract for the 2006-2007 school year, and sent him written notice regarding its decision. The teacher challenged the board's nonrenewal action, a hearing was held, and the board affirmed its prior decision. The teacher appealed the board's decision to the trial court, which affirmed the board's decision.

In the second case, the other teacher was also employed under a limited contract for the 2005-2006 school year. On the fifth day after the teacher's first evaluation was completed, school was closed due to a heating problem. As such, the evaluator did not meet with the teacher until the following day when school was reopened. The teacher was evaluated a second time on March 30, 2006, and was scheduled to take personal leave to attend a nonschool conference from April 3 to April 7, 2006. Although the evaluator did not schedule a post-observation conference before the teacher left, the conference was held immediately upon her return on April 10, 2006. Afterwards, on April 25, 2006, the board voted not to renew the teacher's limited contract for the 2006-2007 school year, and sent her written notice regarding its decision. The teacher also challenged the board's nonrenewal action, a hearing was held, and the board affirmed its prior decision. She also appealed the board's decision to the trial court. Unlike, however, the first case, the trial court ordered the board to reemploy the teacher for the 2006-2007 school year.

The teacher in the first case appealed the trial court's decision, and the board appealed the court's decision in the second case. Although both appeals dealt with different factual positions, the same basic legal issues were presented to the court of appeals. Essentially, both teachers claimed that the board failed to comply with the evaluation procedures, and that they were not evaluated within five days of their observations. The board, however, argued that it did comply with the procedures as both teachers were provided with their evaluations on the fifth day the teachers worked after the evaluation. In support of its position the board further asserted that based on the definition of "workday," an employee is "scheduled to report for work" if s/he does not have an approved absence from the school on the day in question. To that end, the board asserted that neither teacher was scheduled to report for work, as the first teacher called off on the day in question, and the second teacher was not scheduled because school was closed after the first observation and she was out of town after the second observation. The teachers, on the other hand, claimed that an employee is "scheduled to report for work" on any day s/he would otherwise have to be at school (with the exception of extreme circumstances).

The court agreed with the board's interpretation of the term "workday" and found that it complied with the terms of the collective bargaining agreement in both cases. The court reasoned that the teachers' interpretation would lead to an absurd result as "a school would be required to provide a full-time teacher with the observation report within five school days of the evaluation, no matter what." The court further reasoned that a teacher could call off from work each of the five days in order to avoid the observation report, which would force the school into noncompliance with the agreement.

7. **Incentive Plans – Do They Really Work?:** Some employers develop incentive plans in order to reduce excessive absenteeism. For example, a school district could provide employees with a certificate of recognition, lunch, or monetary incentives on a monthly, quarterly or yearly basis for perfect attendance.
 - a. Will employees actually be motivated to curtail unnecessary absences? Will the problem employees be motivated?
 - b. Avoid the exclusion of personal leave (i.e., "sick leave will be substituted") from incentive plans.

8. **Vacation Pay (Non-teaching employees):** Unless otherwise addressed in a collective bargaining agreement, the statute provides for vacation for nonteaching employees working eleven or more months. Problems when districts allow for excessive accumulation and when the dates for the use of vacation days is not restricted (i.e., custodians who take large blocks of vacation during holidays or summer break when the buildings are best able to be cleaned, etc.). Some districts have restricted vacation leave to 12 month employees only and limited use for custodial/maintenance staff during non-school periods. (Why should a district pay someone 11 months pay for 10 months work?)

9. **Bereavement Pay:** Ohio Revised Code Section 3319.141 allows for the use of sick leave when there is a “death” in the immediate family. Again, no definitions are provided as to who is the immediate family and how long sick leave can be used in the event of a death in that family. To the extent that the immediate family is defined more broadly in the collective bargaining agreement, more paid sick leave will be utilized for this purpose than was probably intended.
 - a. Unions regularly attempt to increase the size of the immediate family and often seek to have a separate provision for “Bereavement Leave” which provides paid days for this purpose that is not charged to sick leave.
 - b. Resist efforts to expand this leave beyond the use of sick leave.
 - c. For deaths outside of the immediate family, emergency personal business leave should be utilized.

10. **“Comp” Time (Non-exempt, non-teaching employees):** The dilemma here is whether or not to allow for the use of “comp” time in lieu of overtime in the first instance. The use of compensatory time can be permitted pursuant to the collective bargaining agreement, a memorandum of understanding, or any other agreement between the board of education and the employee representatives. Once the decision is made to allow for the accrual of compensatory time, employees must be permitted to use it within a reasonable time after making the request provided the use of such time does not “unduly disrupt” the operations of the district.
 - a. Comp time may be accrued to a maximum of 24 hours, after which point overtime hours must be compensated in cash.

- b. If you determine to allow compensatory time, consider placing a provision in the contract which requires an employee to utilize comp time if the accumulated amount reaches a predetermined amount, to avoid what the board believes to be an excessive accumulation.

11. **Absences Related to Workers' Compensation/Work-Related Injuries**

The dilemma here relates to the potential abuse of the workers' compensation system by employees, an employee's leave status while receiving benefits from the Ohio Bureau of Worker's Compensation ("BWC") and the need to hire substitutes during an employee's absence. While some employees file workers' compensation claims, take the time truly needed to recover from a work-related injury, and return to work, others tend to malingering for months or years on end with no real intention to return to work. Make sure to consider the following once an employee files a claim and begins receiving workers' compensation benefits:

- a. An on-the-job injury typically qualifies as a "serious health condition" under the FMLA because the employee is unable to perform his/her job duties as a result of a condition which involves either in-patient medical care, an inability to perform job duties for more than three calendar days or a chronic/long-term condition. To that end, FMLA leave should run concurrently with workers' compensation.
- b. Given that FMLA leave is unpaid, the employee would receive his/her workers' compensation benefits while on FMLA leave. In the alternative, an employee may elect to substitute his/her accumulated sick leave after sustaining an on-the-job injury in order to receive full pay while on the FMLA leave. However, note that while an employee is on FMLA leave because of an on-the-job injury, s/he may either receive workers' compensation payments or accumulated sick leave, but not both.
- c. Depending upon the nature/extent of the injury, the district could consider offering the employee a "light-duty" position while the employee is still recovering in order to terminate the employee's temporary total disability ("TTD") payments (i.e., the employee cannot work and receive TTD payments at the same time, thereby keeping the district workers' compensation reserve down). Although an employee cannot be forced by the district to return to a "light duty" position, his/her act to decline such a good-faith

offer of light duty could result in the employee being denied continuing TTD payments. Additionally, facilitating an employee's early return to work will:

- (1) Reduce costs associated with employing and training substitutes;
 - (2) Reduce payment of lost-time compensation, exposure to medical costs, and impact on BWC claim reserves and premiums;
 - (3) Facilitate compliance with ADA issues (i.e., if the employee can perform the essential functions with or without a reasonable accommodation);
 - (4) Improve employee morale (as educational services and employees are impacted by issues related to an employee's excessive absenteeism);
 - (5) Potentially benefit both the district and employee, since the employee can have a better transition back to full/regular duty, receive regular wages, maintain work-related relationships with students and other employees, and retain his/her current job skills without the need for additional training.
- d. Once an employee exhausts his/her sick leave and/or FMLA leave, the district should still enforce its leave policies. As such, employees should request an unpaid leave of absence in accordance with the collective bargaining agreement, Board policy and/or R.C. §3319.13. This could potentially reduce issues related to absenteeism and leave abuse. (But see, discussion of *Coolidge v. Riverdale Local School District* in Appendix I below.).
- e. In order to further reduce issues related to absenteeism (and to keep a district's workers' compensation reserve down), a district could opt to continue an employee's regular salary and benefits once s/he has filed a workers' compensation claim.
- (1) The board, however, must have an adopted policy in place authorizing such action or it could be subject to a finding for recovery by the Auditor of State if it continues to pay an employee his/her regular wages and benefits while the

employee has a claim pending with the BWC or once the claim has been approved.

- (2) Further, a form must be filed with the BWC verifying the agreement between the district and employee to pay wage continuation in lieu of TTD or living maintenance compensation and the period of such salary continuation.
- (3) An agreement to continue an employee's wages does not mean that the district has certified the claim or has relinquished its appeal rights.

IV. Responding to Employee Absenteeism: Some Accountability Exercises

- A. The increasing demand for higher performance from public school students has a direct and immediate relationship to the need for enhanced performance of both certificated and non-certificated employees. Thus, it is inherent that employees attend work on a daily basis in order to ensure increased student achievement.
 1. While holding employees accountable for their performance, including attendance, is hard work, it is undisputed that the protection of the educational environment from misconduct and substandard performance by school employees is an absolute expectation of students, parents, co-workers and the community at large.
 2. As such, similar to other types of misconduct, administrators must intervene promptly with employees demonstrating excessive absenteeism and confirm such discussions in writing, irrespective of whether disciplinary action is taken. Also, administrators should set clear improvement goals and dates for when they expect the employee to improve his/her attendance. Below are some examples of how to deal with employee absenteeism.
- B. Case Studies: (See Appendix II for "Answers")

Case #1: Which Way to the First Tee?

The Northpoint Local School District sent out a notification to all intervention specialists that placed restrictions on the use of contractually provided "release time" to prepare IEPs in the Spring. Previously, some of these teachers had begun to take up to two days of release time and perform the work off campus. The administration indicated in the notification that henceforth, all such work would need to be done on campus and all intervention specialists would have to report to their buildings. Despite this clear guidance and the admonition of his building

principal and the superintendent, one teacher (Eldred “Tiger” Jones) absented himself from the premises for two days on dates previously designated for release time and IEP preparation. Mr. Jones was seen during these days competing at an out of town golf tournament.

What actions should the Northpoint Board take?

Is there sufficient cause to terminate Mr. Jones teaching contract?

Case #2: It Only Hurts in the Morning

A high school science teacher approaches his building principal with a request to take sick leave on a “half day” basis given his current (unspecified) medical condition. He produces a note from his doctor indicating only that he is being seen by the physician for “physical and emotional problems.” The doctor recommended that it would be “beneficial” for his patient be allowed to report to work after noon until his issues resolve – estimated to be for a period of three months. The administration seeks further clarification for this unusual request, and the union leadership strenuously objects.

What course of action should the board take in this instance?

How far can the board go in determining the propriety of this unusual request?

Case #3: I Was Sick All the Way to My Vacation Home – Honest!

The collective bargaining agreement in Leisureville Local Schools provides that “personal leave shall not be used immediately preceding or following a non-school day, holiday or school vacation day.” Nevertheless, the personnel director of Leisureville notes the absence of an elementary school teacher on the Wednesday before a Friday off day. This teacher, who called off into the district’s dedicated phone line, had been granted special dispensation in the prior year to take off the day before this same non-school day to “close” on a vacation home in Tennessee. Suspecting a possible violation of the collective bargaining agreement, the personnel director calls the teacher at home and leaves a message on the answering machine. Later that afternoon, he sees the teen-age daughter (a graduate) at the local grocery store and asks, “how’s your mother?” The teen responds by saying that she had left earlier that day for Tennessee but quickly recovered and said that her father was “really sick.” The teacher also called in sick on Thursday without specifying whether the absence was for her or an immediate family member. When the sick leave paper work is finally provided, the elementary teacher said that the absences were because of her own personal illness. The district reprimands the teacher for falsification and docks the teacher two days pay with an admonition that any further such actions will result in

termination. The union president and labor relations consultant are livid and file a grievance.

Did the district overreact?

Is the need to enforce the agreement worth the price of a costly arbitration?

Case #4: Go Ahead and Dock My Pay – What’s the Big Deal?

A maintenance worker at a large “first ring” suburban school district has utilized all of his paid vacation leave for the year and has only a few sick leave days accumulated despite being employed for 18 years with the district. In order to attend his son’s graduation in Arizona, the maintenance worker devises a plan to obtain a substitute for the week and notifies the central office secretary that he will be out for a week but has the work “covered.” The secretary tells him that he has no remaining leave available and that he must get any unpaid leave authorized by the director of buildings and trades. He responds that he would “take care” of notifying his supervisor. When that notification doesn’t happen, and a week following his return, the payroll department is faced with accounting for a leave for which no accumulated vacation days apply and no record of approval for unpaid leave is found. When confronted with this unauthorized absence without leave, the maintenance worker retorts, “Go ahead and dock my pay, what’s the big deal?” The board, based on this unauthorized absence and the employee’s history of excessive absenteeism, terminates the maintenance worker. The union grieves the disciplinary action.

How should the arbitrator rule?

Case # 5: The Reluctant Custodian Returning from W/C Injury

A custodian receives temporary total disability Workers Compensation benefits for a slip and fall occurring on the job in June. In November, she undergoes an independent medical review and is found to have reached maximum medical improvement. Her own doctor agrees with the IMR that the custodian may return to work without restrictions. Reluctantly, she returns to work for four (4) hours but then leaves on her first day back, complaining of pain and stating that she cannot finish her shift. The custodian then utilizes her last few remaining days of sick leave and has no approved leave status.

What action, if any, should the board take relative to this employee?

What if the employee has taken efforts to re-file another Workers Comp claim?

If an unpaid leave is sought for medical reasons – how should the district respond?

Case #6: When Does Sick Leave “Advancement” End?

A teacher with back problems and stress-related issues exhausts all sick and FMLA leave, including a five (5) day sick leave advancement and returns to work on the very day that his entitlement has run out. Due to an illness in her immediate family, the teacher takes a few sick days off before he has accrued any earned sick leave or paid back the original advancement of five (5) additional sick days. The relevant contract language states:

Advancement of Sick Leave. It shall be the policy of the Board of Education, in those instances where certified/licensed staff are newly hired, and, in those cases where employees have exhausted their sick leave, to allow an advancement of not less than five (5) days of sick leave annually. Moreover, the advancement of this sick leave shall then be charged against any subsequent accumulation by the certified/licensed staff member in question. Finally, the Treasurer shall deduct from the staff member’s pay an amount equal to the days the certified/licensed staff member was unable to earn in a given pay period (due to resignation, job change). An individual awaiting a state retirement disability will not be advanced five (5) days’ sick leave.

The district determines to dock the teacher’s pay for the two (2) days of unauthorized leave and reprimand the employee for such absence, threatening termination should the teacher again be absent without leave.

What is the result in the subsequent arbitration?

Case #7: So Many Leaves, So Little Time

A school bus driver asks to use personal leave (3 days) to visit his father who is ill with cancer in California. A review of the language of the collective bargaining agreement indicates that this is not an appropriate use of “personal business leave” as defined therein. Having already purchased the plane tickets, the driver tells the treasurer that he will be utilizing sick leave to care for his ill father in California. The treasurer advises the driver that, unless he is providing primary care for the immediate family member, sick leave would not be appropriate (particularly given the initial request to use personal leave for a visit) and that

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unpaid leave would only be allowed if approved by the board. The driver follows through with the trip and absents himself from the workplace and submits a sick leave request form upon his return. The driver also produces a handwritten note on a doctor's prescription pad suggesting that the driver was in attendance with his father at an appointment on one of the days of leave. The sick leave is denied, the driver is docked three days pay and provided with a written warning concerning falsification of leave.

Should the board have considered more serious disciplinary response?

What will the result be in the subsequent arbitration?

The driver, a minority employee, files a claim of discrimination against the board – what information would be important in analyzing the chances of successfully deflecting same?

Case #8: It Only Hurts When I Come to Work

An art teacher finds himself in the middle of a serious physical altercation between two students and is injured when a 250 pound male student falls on his right foot causing a fracture and resulting in other injuries. He takes paid assault leave under the contract for ninety (90) days and is now hoping to obtain an additional ninety (90) days per language in the agreement that permits an extension. A co-worker, who insists on anonymity, reports to the building principal that the art teacher has been seen at the mall walking for a considerable distance without a limp or any assistive devices. At a meeting set up to discuss the assault leave extension, the art teacher limps into the building with a cane and complains that he is unable to stand, let alone walk, for any real length of time without pain.

Should the board incur the expense of a private investigator to take video of the teacher?

Assuming video confirms that assault leave has been fraudulently obtained, what next?

Case #9: Dock Days as “Past Practice”

A district maintenance worker with 17 years of experience has no accumulated sick leave remaining, but takes off a day due to illness. His supervisor, in addition to docking his pay, reprimands the worker for excessive absenteeism and unauthorized leave, threatening to terminate his contract if such absenteeism continues. The worker and his union representatives complain that there is “past

practice” for allowing “dock days” to be used without negative recourse. The contract is silent on the availability of dock days and/or unpaid leave days. After two more instances and progressive discipline (a suspension without pay for 3 days) the district fires the employee for excessive absenteeism.

What is the result in the subsequent arbitration?

Case #10: The Thanksgiving “Coincidence”

For several years, a classroom aide has requested and been permitted to take unpaid leave for three days to accompany her husband (a local fire fighter) to Florida over the Thanksgiving week, ostensibly because this was the only time the husband could get off of work for any time. There is nothing in the contract that specifically allows for such leave. Last year, upon granting the request, the superintendent very clearly indicated to the aide that such future requests would not be granted for a number of reasons, and that she should not make plans to absent herself from the workplace during Thanksgiving week. Nevertheless, a request was forthcoming this year and the superintendent denied the unpaid leave, citing her previous correspondence and reasoning. At a meeting to discuss this denial on Wednesday, the aide showed no signs of physical injury or impairment. Miraculously, two days later, on the Friday before the week of Thanksgiving, the aide produced a handwritten note from her podiatrist stating that she had “heel spurs” in both feet and would be unable to work the following week. The aide was warned that a falsification of sick leave would be responded to with strong disciplinary action. The aide did not appear for work and the board suspended her without pay for ten (10) days.

What is the result in the subsequent arbitration?

Case #11: Is Unpaid Leave the Leave that Never Ends?

A non-teaching employee who is employed with the school district as a bus driver and cafeteria worker sustains serious injuries in a non-work related motor vehicle accident during the summer of 2010. He is unable to return to work at the beginning of the 2010-2011 school year and is placed on both sick and FMLA leave. By December, 2010, the employee has burned his accrued sick leave and requests one-year of unpaid leave which is approved by the board. At the expiration of the employee’s first year in December 2011, the board grants the employee an additional unpaid leave of absence for one-year (i.e., until December, 2012). At the beginning of the new school year, in August, 2012, the board advises the employee that he needs to either return to his full job (i.e., both positions) or return and resign from one of the positions upon the expiration of his leave. In addition, the employee is advised that due to the fact that he has been

out on a prolonged leave, he must obtain the appropriate training and re-certification in order to drive a bus, provide the board with a medical release indicating that he is capable of returning to work and submit to a physical examination.

Despite being notified on several occasions of the need to submit a medical release to the board certifying that he is able to return work and perform his duties as a bus driver, the employee fails to provide such certification. Upon the expiration of the employee's leave, the board notifies the employee that his failure to return to duty and provide the board with the required certification has resulted in the voluntary termination of his employment with the Board. Weeks later, the employee attempts to produce untimely and insufficient medical documentation demonstrating his ability to return to work. Unconvinced, the board does not waiver from its decision that employee voluntarily abandoned his employment.

What is the result in the subsequent arbitration when the employee claims wrongful termination?

C. Focused Documentation: The “Art” of the Effective Written Response

1. The Basics: General Rules for Documenting Specific Instances of Employee Misconduct/Discipline Such As Abuse of Leave
 - a. Documentation should follow any conference with employee that results in a finding of misconduct (i.e. any incident serious enough to warrant a pre-arranged meeting is one which should warrant documentation if the allegations are confirmed), including absenteeism. However, similar to other instances of misconduct, avoid any predetermined outcome.
 - b. Be descriptive in illustrating leave abuse, and indicate precise times, dates; refer to and/or “tie in” prior instances of absenteeism. If an administrator has anecdotal notes pertaining to similar misconduct which has not been previously recorded, now is the perfect time to include reference to those dates and events in the written documentation.
 - c. Avoid personal attacks or emotional harangues: stay as factual and impartial as the circumstances permit. Defamation issues can arise – stick to known and objectively determined facts!

- d. Consider inviting a response – even if the ability to do so is already specifically set forth in the collective bargaining agreement (in which case – refer to it). Failure to respond will provide a later presumption that the document was deemed accurate by the employee. (Official personnel documents should have confirming signature of employee.)
- e. Where the matter is one that might lead to further “activity” (grievance, discrimination claim, ULP, etc.), strongly consider another opinion before acting, including that of board counsel if you haven’t already done so. Getting legal advice at the point of attack can pay dividends both operationally and in cost savings by resolving the issue early.
- f. When an employee, in the course of your investigation, makes an admission of a particular fact relevant to the issues under investigation (i.e., employee admits that s/he used sick leave to go on a family vacation) – make certain that it is clearly repeated in the specific incident document.
- g. If a response is filed – scrutinize it very carefully – it may require a further clarification. (Avoid the temptation, however, to “negotiate” or re-write the language of your original directive.)
- h. Place the employee on notice, where applicable, that his/her abuse of leave will be further reflected on his/her performance evaluation – then do just that!
- i. Provide for acknowledgment of receipt by employee on the actual document and then place in the personnel file.

Sample Documentation on Absenteeism Issues

NOTIFICATION OF POSSIBLE TERMINATION – WORKERS COMPENSATION DENIED

Charles Whiner
999 Winealot Road
Workless, Ohio 47777

Dear Mr. Whiner:

This letter is being written to advise you of the fact that you have exhausted your accrued sick leave. In addition, the Board is not presently aware of any allowed Workers Compensation Claim or injury that would preclude your return to work. In fact, our records indicate that you have been cleared for a return to work without restrictions by an independent medical review officer and your own personal physician. In addition, the District has not received any request from you for an unpaid leave.

As a result, you are currently absent without approved leave and subject to termination by the voluntary abandonment of your position. If you wish to avoid this outcome, it is imperative that you communicate your intentions to this office immediately relative to a return to work.

Be advised that a request for unpaid leave, if timely made, is not required to be granted by the Board unless there is a legitimate medical reason. Again, as of this date, the Board has not received a request for an unpaid leave.

Sincerely,

William “Scrooge” Jones, Treasurer

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TERMINATION LETTER FOR ABANDONMENT OF POSITION

Jim Jones, Bus Driver
456 Malingerer's Way
Scam City, Ohio 48989

Dear Mr. Jones:

This letter will serve as a follow-up to my previous correspondence of March 26, 2012 which advised you that you were absent from your position with the Board of Education without authorized or available leave. At that time, your accumulated sick leave had been exhausted, and you had neither sought nor been granted any other available leave mechanism to cover your extended absence. Beyond this, there is no question that you failed to report to work and openly ignored the reasonable request of your immediate supervisor for information pertaining to your absence and/or return.

Since the date of that correspondence, and despite the assurances of your OEA Labor Relations Consultant that you had agreed to do so, the District has received no indication of your intent to seek an unpaid leave from the Board for medical reasons. Consequently, in addition to being absent without leave, you have engaged in continuing insubordination by failing to respond to the reasonable requests of your employer for information and/or an appropriate leave request.

Absence without pay has not been authorized as required by the Contract and your conduct in failing to report to work or obtain an authorized leave remains unacceptable. It is therefore my conclusion that you have voluntarily terminated your employment by abandoning your position as a bus driver with this District. At the very least, your continued unauthorized absence is grounds for dismissal.

To that end, I am scheduling a due process preliminary hearing consistent with the contract at 9:00 a.m. on April 8, 2012 at the Board office to review this clear misconduct on your part. You will be provided an opportunity to respond to these charges at that time and to show cause why your employment with the District has not been severed by your conduct and/or should not otherwise be terminated for cause. Failure to present yourself for this hearing will result in the immediate acceptance of your resignation by the Board on the basis of job abandonment.

Should you have any further questions regarding this matter, please feel free to contact me at your convenience.

Sincerely,

Will Smith, Superintendent

Britton, Smith, Peters & Kalail, Co., L.P.A.

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***MEMORANDUM TO STAFF CLARIFYING SICK LEAVE
ADVANCEMENT AND “ADJUSTING” EXPECTATIONS***

TO: All Classified Employees
Megabucks Local Schools

FROM: Terry Taffypockets, Treasurer

DATE: December 30, 2011

SUBJECT: Sick Leave Advancement

It has come to my attention that in the past, there have been some inconsistencies with regard to the advancement of sick leave and the obligations of those receiving sick leave advancement. According to Article 11, Section 11.1d, “Any advance of sick leave days shall be earned (1¼ days per month of service) prior to any additional use of sick leave credit.” This means that once an individual has been advanced sick leave under any applicable provision of the collective bargaining agreement, they may not be credited with additional advancement unless and until they have satisfied the prior advancement by earning sick leave through regular attendance.

In the past, there have been instances where the District has, in its discretion, advanced sick leave to employees who subsequently did not return to work, or did not return far enough in advance of the end of the contract year to earn the sick leave necessary to repay the advancement.

This memorandum is being issued to notify you that, effective immediately, it will be the practice of the Board to abide by the contract language as stated in 11.1 d. For example, if an employee is absent for a period of five (5) days and has depleted his/her sick leave, he/she may be advanced five (5) days. When the employee returns to work, he/she will not be eligible to request additional advancement for a subsequent illness unless or until those original five (5) days have been earned (1¼ days per month of service). Any employee who exhausts sick leave and is ineligible to request/receive an advancement as set forth above must either qualify for unpaid leave as set forth in Article 11.3 or obtain sick leave donation under the provisions of Article 11.11.

The absence of employees who are not in an authorized leave status will be considered unexcused and result in disciplinary action up to and including termination.

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MEMORANDUM TO STAFF CONCERNING ABSENCE – GENERALLY

Memorandum: April 15, 2014

To: Support Staff Employees -- Tardy Local Schools

From: Phil Jackson, Superintendent

Re: Unauthorized Absences

This memorandum is intended to clarify certain issues pertaining to employee absences. In particular, there seems to be a growing misconception that employees may completely exhaust authorized sick, personal and FMLA leave and nevertheless remain employees of the District in perpetuity. That is simply not the case.

In the first instance, the Board has no obligation to maintain the employment of anyone who is not on approved leave and/or an authorized leave of absence. At the end of any such leave, an employee is required to return to work or will be deemed to have voluntarily terminated the employment relationship by abandoning his or her position. In order for such employees to remain available for return to duty, they must first seek and then be granted unpaid leave by the Board of Education. Where legitimate health concerns are the basis of the request, and such illness or injury is established, the law provides some measure of assurance that unpaid leave will be granted. However, the leave is not self-executing or automatic and must be sought by the employee from the Board.

Excessive absenteeism (i.e., where sick leave has been exhausted) remains a legitimate basis for the termination of employment, as does falsification of sick leave.

The procedure to follow if you have a long-term illness or injury (five days or more) is to forward medical verification to your immediate supervisor upon request. Medical verification is not simply a note from a doctor with a signature suggesting that you are under his or her care. Medical verification is a written explanation from a certified physician suggesting a medical reason and/or diagnosis that otherwise precludes you from performing the essential functions of your job and including a date for your return to work. If a physician is unable to determine a return to work date, then your next appointment date should be indicated and will serve as the authorized return date pending further written verification of the need for extended leave at that time.

It is the intention of the Board of Education and the administration to assure that absences from the work place are strictly limited to those approved and approvable leave instances, so that the integrity and viability of the educational mission of the District can be maintained. We appreciate your assistance in this effort.

Should you have any questions regarding the information, please feel free to see either Mr. Jackson or Mr. Uber.

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LETTER DENYING EARLY RETURN FROM UNPAID LEAVE – CONDITIONAL

Donna Workalot
777 Sleepy Hollow Drive
Faxitin, Ohio 48787

Dear Ms. Workalot:

I have given much consideration to your request to return from the board adopted unpaid leave for this academic school year. I must remind you that it was your excessive absenteeism and health issues that led us down the path of the unpaid leave request last year. I further need to note that it has always been my position that it is critical to our operation to have the consistent presence of a school nurse at the middle school.

In considering your request, I relied heavily on the collective bargaining agreement Article 9.51, which plainly states that you, as an employee, must notify me in writing on or before July 10th of your request to return early from an approved unpaid leave. While the prospect of an early return is discretionary on my part, it is not insignificant that you missed this important deadline and to date have not requested a return to work in writing to this office. In either event, I have no obligation to return you to full-time work and it is my decision to deny your request for an early return to duty.

However, I am willing to allow an early return to work on a provisional basis if the following terms can be met in an agreement to be executed with the Board by you and the HEA with the following parameters:

1. That you sign a medical release allowing the board physician to talk with your physician for the purposes of determining the propriety of an early return and the prospects of meeting our expectation for regular attendance.

2. Following a positive response to No. 1, above, there must be consistent attendance by you, using only accrued sick or personal leave in compliance with state law and the Contract. (Note: if either of the above physicians determines that an early return is unlikely to result in regular attendance, there will be no early return from leave, provisional or otherwise).

3. An agreement that any absence that exceeds your accrued sick or personal leave will result in an AUTOMATIC return to unpaid leave the remainder of the school year, without any further reconsideration for an early return until that time.

4. It must be acknowledged by all parties that this agreement, if executed by the parties, shall supersede the Contract and is not subject to the grievance procedure.

I am willing to prepare a final agreement along these lines only if you and the Union are prepared to accede to these points. If not, the decision to deny an early return will stand.

Please let me know your thoughts at your earliest convenience.

Dr. Sam Williams, Superintendent

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SAMPLE CORRESPONDENCE SEEKING VOLUNTARY RELEASE OF MEDICAL INFORMATION – PRIOR TO DISCIPLINARY ACTION

Laura Taken
876 Cruise Often Drive
Lazy Town, Ohio 45676

Dear Ms. Taken,

In response to your letter of September 19, 2013, please be advised, in the interests of veracity, that the Board has continuously sought independent verification of your claimed illness or injury in regard to your absence from work on November 17, 20 and 21, 2012. These absences and the purported use of sick leave came after you were unambiguously denied the use of unpaid leave and admonished not to attempt to misuse sick leave on the date(s) in question. In the face of these facts and inquiries on behalf of the Board, you have remained silent. This is so even after, as you say in your correspondence, I related at length my doubts “as to the severity of [your] illness or injury.”

Nevertheless, on December 13, 2012 and then again on January 8, 2013, your representative, speaking on your behalf, indicated that no medical information would be voluntarily forthcoming. At the December 13th meeting, your OAPSE field representative, Gene Debs, emphatically stated that you were not going to provide a medical release in response to the Board’s reasonable request. That refusal was repeated at the Board hearing in January and this posture has remained inviolate since that time in communications between Mr. Debs and our Board counsel.

It speaks volumes that when confronted with disciplinary action based upon the circumstances of what Mr. Debs has euphemistically characterized as a “humungus coincidence,” you are and remain unwilling to allow for a voluntary inspection of the records relating to treatment by a physician under whose care you claim to have been at the time. A quick review of Webster’s suggests that “veracity” is defined as “devotion to the truth.”

Sincerely,

I.M. Macavicious, Superintendent

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***NOTICE OF INTENT TO TERMINATE FOR UNAUTHORIZED ABSENCE WITH
PROPOSED RESOLUTION AND FULL SPECIFICATIONS***

Mr. C.U. Later
888 Absence Way
Snooze City, Ohio 47878

Re: Notice of Intention to Recommend that the Board of Education Consider
Termination of Employment Contract

Dear Mr. Later:

You are hereby notified that, pursuant to Ohio Revised Code Section 3319.16, I intend to recommend that the Board of Education of the Snooze City School District initiate proceedings for the termination of your employment contract for good and just cause for your blatant insubordination in the deliberate abandonment of your position on April 28 and 29, 2014, in addition to your dishonesty, falsification of leave and neglect of professional responsibilities surrounding that those unauthorized absences.

The seriousness of these grounds for possible termination is such that I intend further to recommend that your employment contract be suspended, without pay or benefits, effective 12:01 a.m., May 15, 2014, pending final action on your employment status. The Board will consider this matter at its regular meeting on May 14, 2014. At that time, the Board will consider adopting the resolution attached hereto, which includes a full specification of the grounds to be considered in determining whether your contract should be terminated.

You have the right to meet with me before the board meeting to respond and present information as to why I should not recommend your employment be suspended without pay or benefits and that your contract be terminated. You will be provided with a full opportunity to respond to the recommended grounds for termination by rebutting or otherwise explaining the stated grounds for termination under consideration. You may have counsel of your choice at that meeting. A meeting has been scheduled for May 8, 2014 at 10:30 a.m. at the Board office.

Be advised that should the Board ultimately determine to initiate such termination proceedings, you will have 10 days after receiving notice of that decision in which to file a written demand with the Treasurer for a hearing before a referee.

Sincerely,

Ned Naughtsafast, Superintendent

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SAMPLE LETTER OF REPUDIATION ON "DOCK DAYS" AND FMLA

Hand delivered
President
Teachers Association

Re: Contract/Employment Issues Clarification and
Repudiation of Certain Past Practices

Dear Association President:

This letter is furtherance of the Board of Education's intention to clarify certain Contract and other issues prior to negotiations in addition to announcing an end to an alleged existing past practices in advance of negotiations for a successor agreement.

It is a general rule that neither management nor labor can unilaterally alter a past practice, if such practice has become a binding past practice. However, it is subject to unilateral termination at the end of that agreement's term by giving due notice of intent not to carry the practice over to the next agreement and numerous decisions have recognized this type of termination. In short, past practices do not continue on ad infinitum, but may be repudiated by either party through timely and proper notification of intent to do so before or during negotiations. That is one of the express purposes of this letter.

The publishing of this notice of the Board's intention to change certain existing policies or practices serves to end any binding effect of those policies or practices at the expiration of the labor agreement. In that regard, the following unwritten condition of employment must come to an end, since its continuation has no greater life than the contract under which it may have been formed:

1. The Family and Medical Leave Act ("FMLA") allows employers such as the Board to make the determination as to whether or not to run paid leave (sick, etc.) concurrently with the running of FMLA leave. In addition, an employer may set the "calendar" for determining when the one year period for FMLA leave begins. The Board has engaged in the practice of allowing employees to "tack on" FMLA leave coverage following exhaustion of paid leave options (sick leave). Clearly, conditions have changed in that the cost of paid insurance for unpaid leaves has increased, making the need to run paid leave and sick leave concurrently necessary, feasible and fiscally responsible. Therefore, the Board is announcing an end to the past practice of allowing for the consecutive use of paid leave and FMLA leave. In addition, the prior practice of utilizing a calendar year to define the "12 month period" within which allowable FMLA leave may occur is repudiated. Henceforth, beginning with the 2009-2010 school year, the twelve month period for FMLA purposes will be defined as "the 12 month period

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measured forward from the date the employee's first FMLA leave begins" (i.e., the leave year is specific to each employee). As such, the employee is entitled to 12 weeks of leave during the 12-month period beginning on the first date FMLA leave is taken. The next 12-month period would commence the first time FMLA leave is taken after the completion of any previous 12-month period.

2. Unpaid leave or "dock days" have been routinely granted for bargaining unit members who have either exhausted personal or sick leave and/or are unable to conform such leave appropriately into an approved leave status and nevertheless request additional unpaid leave for other than extended illness or FMLA qualifying leave options.

Having provided you with notice that they we are ending the practice listed above, the Union will be provided an opportunity to attempt to address the desired practice and seek to have it incorporated into the Agreement in upcoming negotiations in order to obtain a continuance of that practice.

Finally, as you well know, over time the Board and the Association have forged agreements through a number of memoranda of understanding to address issues not covered by the original language of the current Contract. It is the Board's position that in order for such agreements to survive beyond the term of the agreement they were formed under, they must be incorporated, by mutual agreement of the parties, into the express language of the next successor agreement during negotiations. Along those lines, it is the intention of the Board to propose that such MOU's, where appropriate, be made a part of the successor agreement. However, there are several circumstances where Board issues in negotiations are directed at matters which intersect with a number of these memoranda.

As such, those MOU's not expressly agreed by the Board and the Association during bargaining to be incorporated into the Contract would be of no further consequence. As in the case of the past practice set forth above, if you wish to see any or all of the memoranda incorporated into the Contract, you should make such proposals in upcoming negotiations.

Sincerely,

Superintendent

cc: Treasurer

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APPENDIX I

A REVIEW OF THE BASIC LEGAL FRAMEWORK FOR FMLA LEAVE

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I. Family and Medical Leave Act

A. Reasons Why an Eligible Employee May Take FMLA Leave

1. Birth and/or care of a newborn child of the employee, within one year of the child's birth;
2. Placement with the employee of a child for adoption or foster care, within 12 months of the child's placement;
3. The employee is needed to provide physical and/or psychological care for spouse, child or parent with a "serious health condition."
4. The employee's own serious health condition makes him/her unable to perform the functions of his/her job;
5. Qualified Exigency Leave; and
6. Military Caregiver Leave.

B. FMLA Protections During the Eligible Employee's Leave

1. Unpaid Leave
 - a. For medical, childcare, or exigency leave (reasons 1-5) – 12 weeks within a designated 12-month period.
 - b. Military Caregiver Leave (reason 6) – 26 weeks during a single 12-month period.
2. Format of Leave
 - a. FMLA leave may be continuous (i.e., all day for a certain number of days), intermittent (i.e., leave taken in separate blocks of time for a single qualifying reason), or reduced schedule (employee works every day, but for less than the full number of hours per day or per week).
3. Employee Entitled to a Position upon Return to Work (Job Restoration)
 - a. Employee is entitled to the same or an equivalent position (in terms of responsibilities, pay, benefits, and other terms and conditions of employment) upon return from FMLA leave.

4. Employer Must Continue to Provide Health Benefits During FMLA Leave
 - a. Employer must continue to provide group health insurance during the period of the FMLA leave.
 - b. The employer is not obligated to continue other benefits (e.g., life or disability insurance) or to allow employee to accrue seniority during the leave period.
 - c. Employer is not obligated to continue allowing an employee on FMLA leave to remain eligible for production bonuses.

C. General Definitions Applicable to All Categories

1. Eligible Employee: A person who has been employed for at least twelve (12) months (need not be consecutive), performed at least 1,250 hours of service during the 12-month period immediately preceding the leave, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. All full-time teachers are deemed to meet the 1,250 hour test (this is a rebuttable presumption).
 - a. If an employee is ineligible for FMLA leave the employer must set forth at least one reason why the employee is not eligible in the eligibility notification.
2. Twelve-Month Period for Taking Leave
 - a. The employer may choose one of four options to determine the 12 month period for taking leave (the 12 month period in which the employee may take up to 12 weeks of leave).
 - (1) Calendar year: January 1 through December 31;
 - (2) Any fixed 12 months, i.e., starting on the employee's start date;
 - (3) Measured Forward: 12 months measured forward from the first day of FMLA leave; or
 - (4) Rolling: 12 months measured back in time for each request for leave.

- b. It is critical for the employer to specify a definition for 12-month period for taking leave; otherwise, the employee can select the definition that is most favorable to him or her. Thus, an employer should establish a policy or language in the collective bargaining agreement to affirmatively define 12-month period, and announce it to employees.
- c. It is recommended that employers utilize either the measured forward or the rolling method to prevent employees from stacking leave. Use of either of the fixed methods can allow an employee to use more than 12 weeks of leave in a 12 month period because of the artificial resetting of leave used to “zero.”
- d. There is a 60-day notice period before a change in definition can go into effect.

D. Concurrent Leave

- 1. The employer may require an employee to substitute (i.e., “run concurrently”) any of his/her earned or accrued paid leave (e.g., sick leave, personal leave, assault leave, vacation leave, compensatory time, family leave) for unpaid FMLA leave.
 - a. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.
 - b. An employee electing to use paid leave concurrently with FMLA leave must follow the same terms and conditions that apply to other employees’ use of such leave.
 - c. The employee is always entitled to unpaid FMLA leave even if he/she does not meet the employer’s conditions for taking paid leave. The employer may waive any procedural requirements for taking any type of paid leave.
- 2. If the employee has not earned or accrued adequate paid leave to encompass the entire 12 workweek period of FMLA leave or 26 workweek period of Military Caregiver Leave, the remaining workweeks shall be unpaid.

- a. Whenever an employee uses paid leave in substitution for unpaid FMLA leave/Military Caregiver Leave, such leave counts toward the 12 workweek/26 workweek maximum leave allowance provided by the Federal law.
3. The employer can require leave taken for an injury or illnesses that qualifies for workers compensation coverage to count against an employee's FMLA leave entitlement.

E. FMLA Issues

1. Attendance Incentives: Originally FMLA leave could not be counted against an employee for purposes of his/her eligibility for such a bonus (e.g., If an employee is eligible for the bonus before taking FMLA leave, s/he was eligible for the bonus upon return to work.). The current regulations expressly permit employers to deny certain bonuses or payments to employees who take FMLA leave, if those bonuses or payments are "based on the achievement of a specified goal such as hours worked, product sold, or perfect attendance, and the employee has not met the goal due to FMLA leave."
 - a. "Employers may deny perfect attendance awards to employees who do not have perfect attendance because they took FMLA leave, provided the employer treats employees taking non-FMLA leave in the same way."
2. Review Procedure for Leave Designated as FMLA: Establish a review procedure for situations when the employer designates leave to count as FMLA, but the employee disagrees and claims it is not a qualifying event.
3. Posters: GET POSTERS UP – IF THE DISTRICT IS INVESTIGATED, THE FIRST THING THE DEPARTMENT OF LABOR WILL LOOK FOR IS THE POSTERS. THE BOARD COULD RECEIVE A FINE (A CIVIL PENALTY) IF THEY ARE NOT PROPERLY DISPLAYED. New posters are available at <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>
4. Overtime: A relatively new regulation addresses the issue of overtime and provides that, where an employee is normally required to perform overtime work but cannot do so due to an FMLA qualifying condition, the employee may be charged FMLA leave for the overtime hours not

worked. This is particularly applicable to intermittent or reduced hour FMLA leave.

F. FMLA Case Law

5. Proposed Rulemaking to Amend the Definition of Spouse In the Family and Medical Leave Act Regulations: *U.S. Department of Labor, (Wage and Hour Division)* (June 2014)
 - a. To ensure that all families will have the flexibility to deal with serious medical and family situations without fearing the threat of job loss, the Department of Labor is moving to update the regulatory definition of “spouse” under the Family and Medical Leave Act (FMLA).
 - b. The Department of Labor published a Notice of Proposed Rulemaking (NPRM) to amend the regulatory definition of “spouse” under the FMLA so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. This will ensure that the FMLA will now be applied to all families equally, giving spouses in same-sex marriages the same ability as all spouses to fully exercise their rights and responsibilities to their family.
 - c. The major features of the NPRM are that: (1) [t]he Department proposes to move from a “state of residence” rule to a rule based on where the marriage was entered into (also known as a “place of celebration”). The NPRM proposes to change the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the State in which the employee resides. A place of celebration rule would allow all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights, regardless of where they live; and (2) The proposed definition of spouse expressly references the inclusion of same-sex marriages in addition to common law marriages, and will encompass same-sex marriages entered into abroad that could have been entered into in at least one state.

- d. These changes would have an impact on FMLA leave usage because the proposed definitional change would mean that eligible employees, regardless of where they live, would be able to take:
 - (1) FMLA leave to care for their same-sex spouse with a serious health condition;
 - (2) qualifying exigency leave due to their same-sex spouse's covered military service; or
 - (3) military caregiver leave for their same-sex spouse.
- e. The proposed change would also entitle eligible employees to take FMLA leave to care for their stepchild (child of employee's same-sex spouse), even if the in loco parentis requirement of providing day-to-day care or financial support for the child is not met.
- f. The proposed change would also entitle eligible employees to take FMLA leave to care for their stepparent (same-sex spouse of the employee's parent), even though the stepparent never stood in loco parentis to the employee.
- g. No date is set when these proposed changes will take effect at this time. Source: U.S. Department of Labor, Wage and Hour Division, Fact sheet: Proposed Rulemaking to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations (June 2014).

APPENDIX II

OUTCOMES FOR CASE STUDIES

APPENDIX II – OUTCOMES FOR CASE STUDIES (pp. 16 – 21)

- Case #1:** The district provided the employee with draft documentation that it intended to utilize in the initiation of termination proceedings and the employee voluntarily resigned rather than face termination.
- Case #2:** Based on union representations that the teacher’s condition was “serious,” the district required a board-provided medical examination. Additional information was also obtained, over strenuous objection from the teachers union, from the teacher’s treating physician relating to the need for taking the morning off. Shortly thereafter, the teacher returned to full time teaching without the use of sick leave.
- Case #3:** The district initially threatened to dock the teacher for the unauthorized use of leave, but backed away upon threat of grievance from the union.
- Case #4:** In a classic case of “baby-splitting,” the arbitrator – who fully agreed with the board and found there was no justification for the employees behavior – nevertheless reinstated him after awarding the board a one-year suspension of the maintenance worker without pay. The arbitrator based his decision on the length of the employees service, but failed to grasp the fact that this senior employee had no accrued sick leave despite his years of employment with the district.
- Case #5:** The employee was forced into seeking an unpaid leave for several months, and was granted same upon legitimate medical evidence. The employee was advised that given her record of absenteeism, no renewals or extensions of the unpaid leave would be granted and has since returned to full time employment.
- Case #6:** The arbitrator upheld the two days of docked pay and rejected the union’s argument that advancements should be granted on the theoretical basis that the employee might be able to earn back advanced days at some point in the future.
- Case #7:** The employer stood its ground on the docked days and the union dropped the matter. The employee’s discrimination claim with the EEOC was determined to be without probable cause.
- Case #8:** The board did incur the expense of a private investigator who produced video confirming that the employee could stand and walk without limping for considerable periods of time. The employee was confronted with the evidence and did not contest the district’s subsequent denial of the contractual right to otherwise extend assault leave.

Case #9: The termination was upheld. The arbitrator denied the existence of a binding past practice and noted that such practices cannot be claimed in those instances where management discretion exists.

Case #10: The arbitrator agreed with the board that the employee's absence was unauthorized and that she was dishonest with her dealings with the board. He nevertheless reduced the suspension from 10 to 5 days.

Case #11: The arbitrator upheld the board's termination of the employee.

APPENDIX III

OHIO REVISED CODE SECTION 3319.13

3319.13 Leave of absence - request - employment of replacement.

Upon the written request of a teacher or a regular nonteaching school employee, a board of education may grant a leave of absence for a period of not more than two consecutive school years for educational, professional, or other purposes, and shall grant such leave where illness or other disability is the reason for the request. Upon subsequent request, such leave may be renewed by the board. Without request, a board may grant similar leave of absence and renewals thereof to any teacher or regular nonteaching school employee because of physical or mental disability, but such teacher may have a hearing on such unrequested leave of absence or its renewals in accordance with section [3311.82](#) or 3319.16 of the Revised Code, and such nonteaching school employee may have a hearing on such unrequested leave of absence or its renewals in accordance with division (C) of section [3319.081](#) of the Revised Code. Upon the return to service of a teacher or a nonteaching school employee at the expiration of a leave of absence, the teacher or nonteaching school employee shall resume the contract status that the teacher or nonteaching school employee held prior to the leave of absence. Any teacher who leaves a teaching position for service in the uniformed services and who returns from service in the uniformed services that is terminated in a manner other than as described in section 4304 of Title 38 of the United States Code, “Uniformed Services Employment and Reemployment Rights Act of 1994,” 108 Stat. 3149, 38 U.S.C.A. 4304, shall resume the contract status held prior to entering the uniformed services, subject to passing a physical examination by an individual authorized by the Revised Code to conduct physical examinations, including a physician assistant, a clinical nurse specialist, a certified nurse practitioner, or a certified nurse-midwife. Any written documentation of the physical examination shall be completed by the individual who conducted the examination. Such contract status shall be resumed at the first of the school semester or the beginning of the school year following return from the uniformed services. For purposes of this section and section [3319.14](#) of the Revised Code, “uniformed services” and “service in the uniformed services” have the same meanings as defined in section [5923.05](#) of the Revised Code. Upon the return of a nonteaching school employee from a leave of absence, the board may terminate the employment of a person hired exclusively for the purpose of replacing the returning employee while the returning employee was on leave. If, after the return of a nonteaching employee from leave, the person employed exclusively for the purpose of replacing an employee while the employee was on leave is continued in employment as a regular nonteaching school employee or if the person is hired by the board as a regular nonteaching school employee within a year after employment as a replacement is terminated, the person shall, for purposes of section [3319.081](#) of the Revised Code, receive credit for the person’s length of service with the school district during such replacement period in the following manner:

(A) If employed as a replacement for less than twelve months, the person shall be employed under a contract valid for a period equal to twelve months less the number of months employed as a replacement. At the end of such contract period, if the person is reemployed it shall be under a two-year contract. Subsequent reemployment shall be pursuant to division (B) of section [3319.081](#) of the Revised Code.

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(B) If employed as a replacement for twelve months or more but less than twenty-four months, the person shall be employed under a contract valid for a period equal to twenty-four months less the number of months employed as a replacement. Subsequent reemployment shall be pursuant to division (B) of section [3319.081](#) of the Revised Code.

(C) If employed as a replacement for more than twenty-four months, the person shall be employed pursuant to division (B) of section [3319.081](#) of the Revised Code. For purposes of this section, employment during any part of a month shall count as employment during the entire month.

For purposes of this section, employment during any part of a month shall count as employment during the entire month.

Amended by 129th General Assembly File No.143, HB 525, §1, eff. 10/1/2012.

Effective Date: 03-31-2003; 2008 SB289 08-22-2008

Note: The amendment to this section by 129th General Assembly File No.10, SB 5, §1 was rejected by voters in the November, 2011 election.

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