

**ADDRESSING CHRONIC ABSENTEEISM UNDER THE
NEW FMLA AND ADA**

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Presented By

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These materials are designed to accompany a presentation and are not intended to be legal advice.

I. **General Principles**

- A. Regular and predictable attendance by employees is a legitimate expectation.
- B. **Excessive absences which are not “protected” by the collective bargaining agreement, School District policy or state or federal law, may (and should) be addressed by the employer, including possible discipline or discharge.**
- C. The language in the collective bargaining agreement matters. It can give an employee more (but not less) protected time off than state or federal law.
- D. The School District’s attendance policies matter. They can give the employee more (but not less) protected time off than the collective bargaining agreement or state or federal law. They should be reviewed periodically.
- E. **Some (but not all) absences are protected by federal and/or state law.**

II. **Protected Absences Under the Family and Medical Leave Act (FMLA) and the Americans With Disabilities Act (ADA)**

A. Health Reasons.

1. Family Medical Leave Act Entitlements.

- (i) The FMLA entitles eligible employees up to a total of twelve (12) work weeks of unpaid leave during any twelve month period when:
 - (a) the employee is unable to perform the functions of his/her job because of a “serious health condition” or
 - (b) the employee must care for an immediate family member (spouse, child or parent) with a “serious health condition.”

2. **Not all illnesses are protected under the FMLA.**

- (i) A “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves either “in-patient care or continuing treatment,” as defined under the FMLA.

** The new regulations include a change to the definition of “continuing treatment.” Under the new definition the individual must have *3 consecutive full calendar days* of incapacity and subsequent treatment or period of incapacity related to the same condition that also includes: (1) treatment two or more times by a health provider within 30 days of the first day of incapacity or (2) one treatment by health provider within 7 days of first day of

incapacity with a continuing regimen of treatment. (29 CFR 825.115).

Continuing treatment also includes any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic health care provider visits (i.e. ≥ 2 per yr according to new regs), and may involve occasional episodes of incapacity (e.g. asthma, diabetes, epilepsy, etc.)

Continuing treatment also includes incapacity due to pregnancy or prenatal care (where visit to health care provider not necessary for each absence); incapacity that is long term or permanent for which treatment may not be effective (where only health care supervision required)(i.e. Alzheimer's, severe stroke or terminal stages of disease); and absences to receive multiple treatments for restorative surgery or condition that would likely result in a period of incapacity of more than 3 days if not treated. (e.g. chemotherapy /radiation for cancer or dialysis for kidney disease)

3. Not all employees are covered by the FMLA.
 - (i) Employees must have been employed by the employer for at least twelve (12) months (the 12 months do not necessarily have to be consecutive months)¹; and
 - (ii) The employee must have worked at least 1,250 hours during the 12 month period immediately preceding the commencement of the leave (executive, administrative, and professional employees are deemed to meet this requirement, unless an employer can clearly show the employee worked less than 1,250 hours); and
 - (iii) The employee must work at a location where at least 50 employees are employed by the employer within 75 miles of the work site.
4. Length of the leave entitlement under the FMLA.
 - (i) Twelve weeks of unpaid time off during a twelve month period.
 - (ii) Twenty six weeks of unpaid leave in a "single 12 month period" is permitted to care for spouse, son, daughter, parent or next of kin of employee who is a current member of Armed Forces. Family

¹ In determining whether an employee has been employed for 12 months or more, the employer has the option of not counting time worked prior to a break in service that extended 7 years or more. An exception to this "7 year rule exists" if the employee's break in service was occasioned by National Guard or Reserve military service or the CBA creates contrary, more employee friendly, timeframe. 29 CFR 825.110.

member must have serious illness or injury incurred in the line of duty on active duty.

(ii) An employee may take the twelve weeks of unpaid leave of absence on an intermittent basis (in more than one block of time) or reduced schedule (reducing normal weekly or daily work schedule) in the following circumstances:

- When the leave is taken for a family member or for an employee's own serious health condition. There must be a medical need for leave and it must be that such medical need can best accommodated through an intermittent or reduced leave schedule.
- If the need for intermittent leave is foreseeable based on planned medical treatment, the employee must make a "reasonable effort" to schedule the treatment in a manner that does not "unduly disrupt" the employer's operations, subject to the approval of the health care provider.
- The employer may transfer an employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave.
- Regulations require that the time increments for use of intermittent leave "be as small as the smallest increment used for other forms of leave but not greater than one hour." (The regulations now provide that the employer's designation of time increments do not need to be tied to the payroll system). The new rule now further provides that employers can designate different increments for certain part of the day. (i.e. one hour increment during first hour of day to discourage late arrivals).

5. What may the employer require of an employee who takes FMLA leave for health reasons?

(i) When the necessity of a leave is foreseeable, thirty (30) days' advance written or verbal notice of the request for the leave of absence. For leaves that are not foreseeable, the employee must give notice "as soon as practicable" (within two (2) business days of when the need for leave becomes known to the employee).

(ii) **The employer may require that the employee use his/her accrued paid leave (under School District policy, the collective bargaining agreement, etc.) concurrent with the FMLA leave to avoid "stacking" leaves, IF:**

- The reason for the leave qualifies under a policy or collective bargaining provision. For example, one or more of the paid leave “banks” could otherwise be used for absences due to the employee’s illness or illness of a family member.

NOTE: An employee may also choose to use such accrued paid leave during his/her FMLA leave, even if the employer does not require it.

- If an employer intends to require that the employee use accrued paid leave during FMLA leave, the employer should provide written notification to the employee at the beginning of the FMLA leave.

****Workers’ Compensation Exception**

Paid leave cannot be used during a FMLA leave if the employee’s absence from work is because of a “serious health condition” that is also a workers’ compensation injury for which the employee is receiving workers’ compensation benefits. The leave of absence can be counted against the employee’s FMLA entitlement (it reduces the 12 weeks); however, an employer cannot require the employee to exhaust any form of paid leave and the employee does not have a right to use paid leave concurrent with the FMLA leave.

****Disability Pay**

If benefits from short term disability insurance are paid during the FMLA leave, the employer cannot require use of accrued paid leave.

- (iii) The employer may require certification from the employee’s health care provider.
 - Under the FMLA, an employer may require a certification from the health care provider of the person requiring care, whether it be the employee or the employee’s spouse, child or parent, for the following information:
 - a. That the employee or the family member has a serious health condition;
 - b. The date on which the serious health condition commenced;
 - c. The probable duration of the condition;
 - d. A statement that the eligible employee is needed to care for the spouse, child or parent;

- e. An estimate of the amount of time that the employee is needed to care for the spouse, child or parent; and
 - f. A statement that the employee is unable to perform the functions of his/her position.
- For intermittent leave or leave on a reduced schedule, the certification can also require the following:
 - a. For planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;
 - b. For leave due to an employee's own serious health condition, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule; or
 - c. For leave due a family member's serious health condition, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the child, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.
 - The employer may also require recertification during the leave on a reasonable basis. The request for recertification cannot be made more often than every 30 days unless:
 - a. The employee requests an extension of a leave;
 - b. Circumstances described by the previous certification have changed significantly; or
 - c. The employer received information that casts doubt upon the continuing validity of the certification.
 - Under certain circumstances the employer may request a medical certification that the employee is able to return to work. However, if the employer intends to require such certification, the requirement must be clearly explained to the employee at the time the employee requests FMLA leave and should be set forth in the employer's written policy. Women returning from pregnancy leave should not routinely be asked for a fitness for duty certification.

(iv) Special requirements for instructional employees.

- When instructional employees seek intermittent leave that is foreseeable, and when such leave would constitute greater than

20% of the total number of working days in the period during which the leave would extend, the School District may require the employee to elect to take the leave in a block (rather than intermittently) for the entire period or to transfer to an available alternative position within the school system that is equivalent in pay, for which the employee is qualified, and which better accommodates the intermittent situation.

Also, under certain circumstances, the employer can dictate when an instructional employee may return from an FMLA leave.

- If the FMLA leave begins five or more weeks prior to the end of the semester, and the period of leave is at least three weeks, the School District can require an employee seeking to return within the last three weeks of the semester to waive return until the next semester.

NOTE: This applies to FMLA leaves for any reason.

- If an employee begins an FMLA leave less than 5 weeks before the end of the semester and the period of leave is greater than two weeks, the School District can require an employee seeking to return within the last two weeks to wait until the next semester.

NOTE: Applies to FMLA leaves for any reason, except the employee's own serious health condition.

- If an employee begins a FMLA leave three or fewer weeks before the end of the semester and the period of leave is greater than five working days, the School District may require the employee to wait until the next semester to return to work.

NOTE: Applies to FMLA leaves for any reason, except the employee's own serious health condition.

6. What are the employer notice requirements?

Eligibility Notice. Within 5 business days after an employee specifically requests FMLA leave or if an employee otherwise requests leave that may be FMLA qualifying, the school should notify the employee of their eligibility to take FMLA leave and it will provide the employee with a Rights/Responsibilities Notice.

Designation Notice. Within 5 days after receiving the health care certification form or otherwise receiving enough information to determine if the leave is being taken for a FMLA qualifying reasons, the school should notify the employee about whether the leave will be designated and counted as FMLA leave. If the school is

seeking a Fitness for Duty Certification for an FMLA designated leave it should notify the employee of this with the designation notice and it should provide the proper Return to Work Certificate with the designation notice. A detailed job description should also be provided to the employee to share with the health care provider.

7. The Americans with Disabilities Act

- (i) If an employee is “disabled”, as defined under the Americans with Disabilities Act, a reasonable accommodation, under some circumstances, may be a leave of absence beyond the 12 weeks of unpaid leave under the FMLA.

NOTE: Employers are not required to grant a leave of absence to a “disabled” employee if it creates an “undue hardship.” Also, employers are not required to provide reasonable accommodations which may pose a “serious threat to the health or safety of the disabled person or others.”

- (ii) Illness (even a “serious medical condition” under the FMLA) does not necessarily mean an employee is “disabled” under the ADA. Coverage under the ADA is limited to an individual who is a qualified person with a disability. A “disability” under the ADA is:

- (1) a physical or mental impairment that substantially limits one or more of the major life activities of the employee;
- (2) an individual having a record of such an impairment; or
- (3) an individual regarded as having such an impairment.

- (iii) **A “disabled” employee under the ADA does not automatically get the time off he/she requests. A reasonable accommodation may not be the one the employee prefers (i.e., time off). There may be accommodations other than absence from work that could be implemented so that the employee can perform the functions of his or her job.**

- (iv) **Under the new ADA “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” (42 U.S.C. § 12102(4)(D))**

- (iv) **An indefinite leave of absence is not a “reasonable accommodation.”**

- (v) **The employee cannot use the ADA as a “weapon” in a disciplinary situation. For example, an employee is usually not covered under the ADA if he/she waits until the brink of**

discharge to request accommodation. Likewise, the employer is not required to lower its standards for performance (i.e., misconduct) in order to accommodate a disability.

8. What are the significant changes to the ADA that effect how schools respond to an employee's claim of disability?
- A. Findings and Rules of Construction: Congress removed the finding that there are 43 million individuals with a disability and that disabled persons are a "discrete and insular minority. The amendments also state that the definition of disability must be construed in favor of "broad coverage of individuals . . . to the maximum extent permitted" by the statute.
- B. Definition of Substantially Limits: The new act expressly overturns the Supreme Court's decision in *Toyota v. Williams*, 543 U.S. 184 (2002). In the Toyota case, Supreme Court held that in order for a physical or mental impairment to "substantially limit" a major life activity, the impairment must "prevent or severely restrict" the individual from doing activities that are of central importance to most people's daily lives. The amendments state that the holding in Toyota "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."
- C. Definition of Major Life Activity: The new act specifically defines "major life activities." The new definition expands upon the definition of "major life activity" that was found in federal regulation. Under the new law "major life activity includes but is not limited to:
- Caring for one's self, performing manual tasks, seeing, hearing, hearing, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- The amendments also state that an "impairment that substantially limits one that major life activity need not limit other major life activities in order to be considered a disability."
- D. Mitigating Measures: The new law expressly overturns the Supreme Court's decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). That case determined that mitigating measures should be considered when determining if a person is substantially limited in performing a major life activity. Under the *Sutton* case conditions that were treated by medications or by other means might not be viewed as a disability. However, the new amendments

indicate that the determination of whether an impairment substantially limits a major life activity must be made without regard to the use of mitigating measures, including things such as: medication, medical equipment, low vision devices (other than ordinary eye glasses/contacts), prosthetics, hearing aids, a mobility devices, oxygen equipment, assistive technology, auxiliary aids and services, learned behavior or adaptive mineralogical modifications, or reasonable accommodations.

E. Protection for Individuals “Regarded As” Disabled: The ADA protects individuals regarded as disabled even if they are not actually disabled. Under the new law, the following has been clarified with respect to this class of individuals:

- A person can meet the definition of being “regarded as” disabled, whether or not the perceived impairment would actually result in a substantial limitation to a major life activity. In other words, in order for a person to qualify as “regarded as” disabled under the new law the person only needs to establish that the school believed that the person had a physical or mental impairment regardless of the impairment’s significance.
- Transitory or minor impairments do not give rise to an assertion that an individual has been “regarded as” disabled. A transitory impairment is defined under the new ADA as having an actual or expected duration of six months or less.
- There is no requirement to provide a “reasonable accommodation” to an individual “regarded as” disabled

F. Episodic Conditions: The new ADA overturned, the holding in *Toyota* that indicated that an impairment must have an impact that is “permanent or long-term.” The new law clarifies that an “impairment that is episodic or in remission is a disability, if it would substantially limit a major life activity when active.”

9. What may the employer require from an employee who may be “disabled” under the ADA when he/she requests time off?

(i) An interactive process. This means:

- The employer may (and should) ask for information from the employee and his/her health care providers in order to determine if the employee is “disabled”, as defined under the ADA, and what accommodations the employee and/or health care providers

believe will allow the employee to perform the essential functions of his/her job.

NOTE: Under the Minnesota Government Data Practices Act, the employee must give written consent for the release of information from (and to) the health provider. Refusal to authorize the release of information needed to determine if the employee is “disabled” may constitute a failure to cooperate in the interactive process and eliminate coverage under the ADA.

- (ii) Independent medical exam.
 - **Under state law (Minnesota Human Rights Act), an employer may request or require a current employee to undergo a physical examination to determine his/her ability to perform job functions *only* if the employee consents to such an examination. Therefore, employers must obtain written consent for a medical examination. Consent forms should be developed that conform with the Minnesota Human Rights Act.**
 - An employee’s refusal to consent to an independent medical examination, in some situations, may constitute a lack of cooperation in the interactive process and thus remove the employee from ADA protection.

B. Parenting Reasons.

1. Family Medical Leave Act Entitlements.

- (i) Up to 12 weeks of unpaid leave in a 12 month period *minus* any FMLA leave the employee has taken for other qualifying reasons (i.e., serious health condition of the employee or family). The parenting leave entitlement applies only to the following:
 - The birth of the employee’s child (the leave must conclude within 12 months of the birth) or
 - Placement of an adopted or foster child with the employee (the leave must conclude within 12 months of the adoption or the placement of the child).
- (ii) Employees are not entitled to intermittent or reduced schedule leaves for parenting reasons.

(iii) Use of accrued paid leave.

- **The FMLA (29 CFR §825.207(b)) allows employers to require that accrued paid leave (under policies, collective bargaining agreement) that applies to absences for parenting reasons run concurrently with the FMLA parenting leave until the paid leave is exhausted. This applies to all types of paid leave, *except* paid sick leave.**
- Under state law (Minn. Stat. §181.94) employees are entitled to six weeks of unpaid leave for the birth or adoption of a child. Such leave runs concurrent with FMLA leave. Like FMLA, the state law (Minn. Stat. §181.943) allows employers to require the use of accrued paid leave which applies to absences for parenting reasons, *except* accrued sick leave.

(iv) Notice requirement.

- Most parenting leaves are “foreseeable”; therefore generally there is a 30 day notice to the employer. However, in the case of a medical emergency or leaves that are not foreseeable, the employee is required to give the employer notice as soon as practicable (ordinarily two business days).

III. Benefits During FMLA and ADA Leaves of Absence

A. Family Medical Leave Act.

1. Health insurance.

- The employer is required to maintain group health insurance coverage for employees on FMLA leave, if such insurance was provided before the leave, on the same terms as if the employee had continued to work.
- Employees must continue to make the same contributions to health insurance premiums as active employees. Arrangements for contributions must be specified in writing in advance.
- Employees may choose to drop out of the group health insurance plan during the period of leave.
- Employees who do not return to work from an unpaid FMLA leave may be required to reimburse the employer for premiums the employer paid from maintaining group health insurance coverage during the leave, unless the employee does not return to work because of a serious health condition or other circumstances beyond the control of the employee.

2. Other benefits.

- An employee is not entitled to accrue seniority during FMLA leave.
- An employee is entitled to any unconditional pay increases that occur during the FMLA leave.
- FMLA leave may not be treated as a break in services for purposes of vesting in retirement plans.
- An employer is not required to maintain life insurance for an employee on a FMLA leave. However, if life insurance is continued by the employer in other unpaid leave situations, the employer is required to maintain life insurance coverage for FMLA leaves. Employers are required to restore all benefits to employees returning from an FMLA leave. Therefore, because life insurance may have pre-existing condition limitations or wait-out periods, employers may have to maintain life insurance coverage during an FMLA leave in order to avoid an interruption in coverage. In that case, the employer has the right to recover the employee's share of any premium amount paid in order to avoid an interruption in coverage.

B. Americans With Disabilities Act.

- The ADA is an anti-discrimination law. Employees must be treated the same as other employees who take leaves of absence in regard to health insurance or other benefits. The employer's policies, collective bargaining agreements, etc. should be applied.

IV. Return to Work from FMLA/ADA leaves.

A. Family Medical Leave Act.

- Employee must be restored to his/her original position, or to an equivalent position with the equivalent pay, benefits, and working conditions, including privileges, pre-requisites and status.
- Limitations to the timing of return for instructional employees (see 5(iv) of this outline, page 5).
- In limited circumstances, the employer may deny return to work of "key" employee (a salaried employee who is among the highest paid 10% of the employees employed by the employer within 75 miles of the facility at which the employee is employed). The employer must show "substantial and grievous economic injury".

- School Districts may, through School Board policies, practices, and collective bargaining agreements, control reassignment when an employee returns from an FMLA leave. For example, a teacher returning from an FMLA leave may be assigned a different course, grade level, school building, class size, etc. However, the employee must receive pay and benefits equivalent to his/her position prior to the FMLA leave.

B. Americans with Disabilities Act.

1. The employee must be restored to his/her original position, unless the employer can show “undue hardship”.

V. Notice and Policy Requirements for Employers.

A. **Employers are required to have a written policy if they have policies regarding other employee benefits. Such policies should include:**

1. Statutory definition of “serious health condition”;
2. All requirements of employees regarding notice;
3. Consequences for failing to follow the policy;
4. Benefits during leaves;
5. Medical certification and fitness for duty certification;
6. Employees’ right to use and School District’s right to require use of paid leave;
7. Reinstatement rights/limitations;
8. Sample forms; and
9. Designate the method of determining the 12 month period.

B. Employers must post a notice explaining FMLA provisions and procedures for filing complaints for violation of the Act.

VI. **Leaves of Absence for Minnesota School Districts.**

A. Minnesota Statutes § 122A.46—Extended Leaves of Absence.

1. A school district may grant a leave of absence under Minn. Stat. § 122A.46 to any full or part-time elementary or secondary teacher who has been employed by the school district for at least five years and has at least ten years of allowable service, as defined in Minn. Stat. § 354.05, subd. 13, or the by-laws of the appropriate retirement association or ten years of full-time teaching service in Minnesota public elementary and secondary schools.
2. The specific duration of a leave of absence under Minn. Stat. § 122A.46 is determined by mutual agreement of the Board and the teacher at the time the leave is granted and shall be at least three but no more than five years.

3. If a School Board denies a teacher's request for a leave of absence under Minn. Stat. § 122A.46, it must provide "reasonable justification."
4. Teachers on a leave of absence under Minn. Stat. § 122A.46 have a right to be reinstated to a position for which the teacher is licensed at the beginning of any school year which immediately follows a year of the extended leave of absence, unless a teacher fails to give the required notice of intention to return or is discharged or placed on unrequested leave of absence or his/her contract is terminated while on the extended leave.
 - The School Board is not obligated to reinstate any teacher who is on an extended leave of absence under this law, unless the teacher advises the Board of his/her intention to return before February 1st in the school year preceding the school year in which the teacher wishes to return or by February 1st in the calendar year in which the leave is scheduled to terminate.
5. Seniority and continuing contract rights.
 - Teachers who are reinstated after an extended leave of absence under this law retain seniority and continuing contract rights as though the teacher had been teaching in the district during the period of the extended leave.

NOTE: Teachers on leave of absence under this statute do not have right to reinstatement to any particular position, nor does the time on leave of absence count toward the teacher's placement on the pay schedule.
6. Employment in another district.
 - (i) Teachers on an extended leave of absence under this statute, do not have a right to reinstatement if they are employed full time or part time in another Minnesota school district.
 - (ii) Employment as a substitute teacher will not disqualify the teacher from reinstatement.
7. Insurance benefits.
 - (i) Teachers on a leave of absence under this statute must continue to receive the health insurance benefits for which the teacher would otherwise be eligible. However, to be eligible for health insurance benefits, the teacher must: (1) request coverage and (2) pay for the full premium.

8. Service credit contributions (Teachers' Retirement Association). Minn. Stat. §354.094.
 - (i) The school district must certify leaves of absence under this statute on a form specified by the Teachers' Retirement Association (TRA).
 - (ii) An employee may pay his/her contributions and receive allowable service credit for each year of the leave, provided that the school district contribution is made.
 - (iii) The school district, teacher and teacher's union may enter into an agreement as to who (teacher, school district or combination of both) will pay for the TRA contributions. However, any agreement that requires the school district to pay all or part of the teacher's contribution must include a sunset of eligibility to qualify for the payment and such agreement may not be part of the collective bargaining agreement.
 - (iv) An agreement whereby the school district is obligated to pay the teacher's TRA contribution must be in writing and signed by the school district and the teacher. A copy of the written agreement must be provided to TRA.

B. Leave to Teach in a Charter School.

1. A school district must grant a teacher's written request for an extended leave of absence to teach at a charter school. Minn. Stat. § 124D.10, subd. 20.
2. The leave entitlement is a maximum of five years. The school district may require that the request for a leave or an extension to the leave be made up to 90 days before the teacher would otherwise have to report for duty.
3. Compensation and benefits.
 - The leave is unpaid; however, the teacher is entitled to continue in the school district's group insurance plan under the same terms as provided in Minn. Stat. § 122A.46 (extended leaves of absence – see 7(i) above).
4. Reinstatement.
 - A teacher on leave to teach in a charter school has the same reinstatement rights and extended leave of absence under Minn. Stat. § 122A.46 (see 4 above).
5. TRA benefits and credits during leave.

- During a leave to teach in a charter school, a teacher may continue to accrue benefits and credits in TRA by paying both the employer and employee contribution on the annual salary of the teacher for the last full pay period before the leave began.

C. Suspension and Leave of Absence for Health Reasons - Minn. Stat. § 122A.40, subd. 12.

1. Affliction with active tuberculosis or other communicable disease, mental illness, drug or alcohol addiction, or other serious incapacity shall be grounds for temporary suspension and leave of absence while the teacher is suffering from such disability if (1) the teacher consents or there is evidence that suspension is required from a physician who has examined the teacher and (2) the physician is selected from a list of three provided by the school board and the examination is paid by the school district.
2. In the event of mental illness, if the teacher submits to such an examination under this statute, and the examining physician's or psychiatrist's statement is unacceptable to the teacher or the school board, a panel of three physicians or psychiatrists must be selected to examine the teacher at the board's expense. The board and the teacher shall each select a member of the panel, and those two members must select a third member.
3. During the leave of absence, the school district must pay the teacher sick leave benefits up to the amount of unused accumulated sick leave, and after it is exhausted, the school district may, at its discretion, pay additional benefits.
4. The teacher must be reinstated to his/her position upon evidence from the physician/psychiatrist of sufficient recovery to be capable of resuming performance of duties in a proper manner. In the event that the teacher does not qualify for reinstatement within 12 months after the date of suspension/leave, the continuing disability may be a ground for discharge under Minn. Stat. § 122A.40, subd. 13.

NOTE: This provision raises untested issues under the Americans with Disabilities Act and the Family Medical Leave Act.

D. Sick or Injured Child Care Leave.

1. Covered employers: All employers with 21 or more employees.
2. Covered employees: All employees who have worked (1) at least 12 months prior to the leave request and (2) have worked an average number of hours per week equal to one-half the full-time equivalent position.
3. Leave Entitlement:

- If sick leave benefits are provided by the employer, the employer must permit the employee to use these benefits to care for a sick or injured son or daughter. The length of leave entitlement is equal to the time accrued by the employee that could be used for leave due to the employee's illness or injury.

NOTE: A sick or injured child does not need to have a "serious health condition" in order for the parent to use the leave.

F. Parenting Leave.

1. Covered employers: Employers with 21 or more employees.
2. Covered employees: Employees who have worked (1) at least 12 months prior to leave request and (2) for an average number of hours per week equal to one-half the full-time equivalent position.
3. Leave entitlement: Up to six weeks for birth or adoption of a child.
4. Paid leave: No.

NOTE: The employer can require the employee to use paid parental or disability leave, but not accrued sick leave. The Minnesota Leave Act for Adoptive Parents requires a minimum of four weeks, or the time set forth in the employee's leave policy for biological parents.

VII. HYPOTHETICALS

Hypo # 1: Mary Lou is a middle school teacher who reportedly suffers from depression and stress. She has had a very difficult time controlling her class that has a number of unruly and disrespectful boys. In the middle of May of the school year she informs the school that she is going to need time off to address her mental health needs. She has provided the District documentation from her psychologist that shows that she suffers from depression. Her doctor has indicated that requires intermittent leave and that she must limit her work days to 6 hours a day and 4 days a week. The doctor has also recommended that she continue to engage in other life activities outside of work such as grocery shopping and taking her kids to school?

- Does Mary Lou have a condition that qualifies her for leave under the FMLA?
- What documentation should the District obtain before it responds to Mary Lou's request?
- If Mary Lou does have "serious health condition" is she entitled to the leave that she requested?
- Might Mary Lou be entitled to her leave request under the ADA?

Hypo #2: Jerry calls in sick for the 6th day in a row reporting that he has the flu? His doctor has given him an IV during an office visit and he has been prescribed medication.

- Does Jerry have an illness that is FMLA qualifying?
- If it is later discovered that Jerry has the West Nile virus and has contracted encephalitis, could the District count his prior days off towards related to his illness before it received confirmation of a serious health condition?

Hypo # 3: Peter tells the school principal (Kathy) that he is having trouble sleeping and eating and that he is feeling sad, lonely and depressed. Over the past 4 months he has missed 15 days of work using up his paid sick leave. Peter has numerous IEPs and evaluations that are over due and he has been frequently late or absent for staff meetings.

- Does Peter have a condition that qualifies him for FMLA leave?
- Does Peter have a disability and is the District obligated to provide him a reasonable accommodation under the ADA for time off?

- Can the School discipline Peter for his absences? What about his late paperwork and late or non-attendance at staff meetings?

Hypo # 4: Sally is a teacher of autism who has a decent work history and has always connected well with her students. In the past two years she has reported that she suffers from frequent migraine headaches. She will often times call into work sick because of a migraine with little or no advanced warning. Sally has given the Principal, Tom, several doctors' notes indicating that she suffers from severe migraines and that she requires bed rest and time away from school when she is reporting a migraine. She has missed 26 days of work over a 6 month period. Tom has heard from a number of parents that on some days when Sally called in sick she was at the Mall.

- What can Tom do if he doubts that Sally is actually sick?
- What can Tom do if he is concerned about consistency in the Autism classroom and the effect that Sally's inconsistent attendance is having?

Hypo # 5: Nathan is a paraprofessional who was hired to work with children with severe behavior problems. He has given the school principal, Kathy, a note from his doctor saying that he has lower back pain brought on by disc degeneration in his lower back. The doctor's note says that Nathan cannot work with behaviorally challenging students because of risk of injury. Nathan asks to be reassigned to another position. When Kathy informs Nathan that there are no other positions for him, Nathan begins to call in sick because of his medical condition. Thereafter, he requests medical leave?

- Does Nathan have a qualifying condition under either the ADA or FMLA?
- Does Kathy have to reassign Nathan?
- What should and can Kathy do to try to get Nathan back to work?