This year is the 20th anniversary of the Family Medical Leave Act. In honor of this anniversary, the Department of Labor recently released data on how many employees took FMLA leave in the last year, and for what reasons. The survey revealed that 16 percent of employees took FMLA leave within the last year, and that 56 percent of those were women. Most, 57 percent, took leave because of personal illness, while another 22 percent used the leave because of the birth or adoption of a child. Another 19 percent took the leave to care for an ill parent, spouse or child. Among those taking leave, 40 percent of employees used 10 days or less, with 70 percent of those heading back to work within 40 days. Before the FMLA, many of these employees may not have taken any leave, or would have been lost to the workforce altogether in their attempts to manage these fairly standard life events. Given the importance of this law, and its impact on schools across the country, this publication is provided as an important overview for schools.

**Family Medical Leave Act**

Employees need time off for any number of reasons – illness, caring for a family member, birth, adoption, military duties. Most schools are aware that many of these trigger obligations on behalf of the employer to provide some job security and fair treatment. Both the federal government and many states have provided for these protections in various laws and related regulations. This piece provides an overview of the federal law, the Family and Medical Leave Act (“FMLA”), as a general background piece for schools. Schools should also be aware that the state in which the school is located may also have a similar law, and that the law may provide greater protection or certain compensation or filings. Finally, the Department of Labor has many resources available on its website, [www.dol.gov](http://www.dol.gov). Many of the regulations and guidance are provided in easy to comprehend formats, with many questions and answers.

**Employee Rights Under the Act**

The FMLA allows eligible employees of a covered employer to take up to 12 work weeks of job-protected, unpaid leave per year and requires that group health benefits be maintained during the leave. As long as the employee is able to return to work before exhausting the FMLA leave, the employee must be returned to the same job or a job comparable in benefits and pay. The purpose of the FMLA is to allow employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons in a manner that accommodates the
legitimate business interests of employers. While some employers may have some concerns about providing such extended leave, studies have shown a direct correlation exists between stability in the family and productivity in the workplace.

There are two very fundamental rules to the application of the FMLA that schools should bear in mind. The right to take FMLA leave applies equally to male and female employees. Therefore, a father, as well as a mother, may take family leave for the birth, placement for adoption or foster care of a child. Secondly, time off under the FMLA may not be held against an employee in employment actions. These kinds of actions include hiring, promotions, pay, or discipline and the taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave. In other words, if an employee is out for 12 weeks, the inability to get work done during that time cannot be held against him or her when it comes to looking at compensation, bonuses, or disciplinary action.

Schools Under the FMLA

By definition, public and private elementary and secondary schools are deemed eligible employers under the FMLA. Therefore, your school is a covered employer under the FMLA. By itself, this requirement means that the school must post the FMLA poster and provide notice requirements. Schools need only provide the protected leave if the employee meets the necessary criteria of an “eligible employee.” There is no clear exemption for religious schools in the FMLA. However, in limited circumstances religious schools may be able to argue a ministerial exemption for certain roles within the school.

Employee Eligibility

As noted above, schools need only provide protected leave if an employee is considered an “eligible employee.” An eligible employee is an employee who:

- Has worked for the covered employer for at least 12 months;

- Has worked for the covered employer for at least 1,250 hours in the 12 months before requesting leave. Full time teachers are deemed to meet the 1,250 hour test. (29 CFR 825.110(c)) An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave. However, if an employee is maintained on the payroll for any part of a week, including periods of paid or unpaid leave during which other benefits or compensation are provided by the employer (e.g., group health plan benefits, workers' compensation benefits,

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2 The FMLA applies to any private employer who engages in commerce, or in any industry or activity affecting commerce, and who has 50 or more employees each working day during at least 20 calendar weeks in the current or preceding year.

Additionally, the FMLA applies to public agencies (state and local governments) and local education agencies, which includes both public and private elementary and secondary schools.

3 For more information on the ministerial exemption, search [www.nais.org](http://www.nais.org) for “ministerial exemption”

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etc.), the week counts as a week of employment for purposes of the 12-month eligibility test; and

- Works at a location where the covered employer has at least 50 employees within 75 miles of the employer’s worksite.

It is often the last requirement that prevents school employees from being eligible for FMLA leave. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually a school board) within 75 miles. However, if the school has multiple campuses within 75 miles, and there are a total of more than 50 employees between the campuses, the employees would be eligible for protected FMLA leave.

**Leave Entitlement**

Once an employee is determined to be eligible for the leave, he or she is entitled to leave under the following conditions. As a practical matter, schools will want to know whether their employees are generally eligible for this leave as the list below is often provided in handbooks and the school should have the requisite notice and tracking documents in its HR files.

Twelve work weeks of leave in a 12-month period for:

- Birth of a child and to care for the newborn child within one year of birth;
- Placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- To care for the employee’s spouse, child, or parent who has a serious health condition;
- A serious health condition that makes the employee unable to perform the essential functions of his or her job;
- Any qualifying exigency arising out of the fact that the employee’s spouse, child, or parent is a covered military member on “covered active duty” or has been notified of an impending call or order to active duty;

Twenty-six work weeks of unpaid leave may be provided during a single 12-month period to care for a covered service member or veteran with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin (military caregiver leave).\(^4\)

An employee may also take up to 15 calendar days of FMLA leave to be their family member while on rest and recuperation leave.

**Spouses Working for the Same School**

Spouses employed by the same employer may be limited to a combined total of 12 work weeks of family leave when leave is taken for the following:

- Birth and care of a child

\(^4\) Note, this leave has specific certification requirements and definitions. Schools that are looking at this particular kind of FMLA leave for employees should consult www.dol.gov and the school's employment counsel.

\(^5\) Leave for care of veterans has recently been updated through statute and regulations. For more information on this important, newer, FMLA leave, see http://www.dol.gov/whd/regs/compliance/whdfs28mb.pdf

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• Placement of a child for adoption or foster care, and to care for the newly placed child; or
• To care for an employee’s parent who has a serious health condition.

Where a husband and wife both use a portion of the total 12 week FMLA leave for one of the reasons listed above, both the husband and wife are each entitled to the difference between the amount of leave he or she has taken individually and 12 weeks for FMLA for other purposes. For example, if each spouse takes six weeks of leave to care for a healthy newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. This limitation for spouses employed by the same employer only applies to the above reasons for taking leave.

FMLA Leave and Substance Abuse
FMLA leave is available for treatment, by a medical provider, of an employee’s substance abuse if the employee’s condition meets the definition of a "serious health condition." Although the general rule is that your school cannot take action against an employee for taking FMLA leave, substance abuse situations can be the exception. If your school has an established policy, applied in a non-discriminatory way, that has been communicated to all employees, that provides under certain circumstances that an employee may be terminated for substance abuse, pursuant to that policy, the employee may be terminated whether or not the employee is presently taking FMLA leave.

Definitions under the FMLA
Once you have determined that employees in your school are entitled to take leave, it helps to understand the definitions behind the different kinds of leave that are available. These definitions are set by the statute and the implementing regulations and help provide guidance for employers and employees trying to follow the law.

Child - Includes biological child, adopted child, foster child, stepchild, legal ward, or a child of a person standing in loco parentis, who is under the age of 18 years or who is 18 or older but incapable of self care because of a mental or physical disability. The FMLA defines in loco parentis to include those with day-to-day responsibilities to care for, and who financially support a child. Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. For example, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty or an employee who is co-parenting a child with his or her same sex partner may exercise the right to FMLA leave.6

Covered active duty - Duty during deployment with the Armed Forces to a foreign country, and in the case of a member of the Reserves, duty during deployment with the Armed Forces to a foreign country under a call or order to active duty.

6 This is nuanced area of the FMLA. Schools should consult other resources in this area, such as these guidance documents http://www.dol.gov/WHD/opinion/adminInterprtn/FMLA/2013/FMLAAI2013_1.htm http://www.dol.gov/WHD/opinion/adminInterprtn/FMLA/2010/FMLAAI2010_3.htm from the Department of Labor.
**Covered Service Member** - A member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or a veteran who is undergoing treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

**Next of kin** – of a covered service member – nearest blood relative other than the covered service member’s spouse, parent, child.

**Parent** - A biological parent or person who stands or stood *in loco parentis* to the employee. The term parent does not include parents "in law."

**Serious health condition** - Illness, injury, impairment, or physical or mental condition that involves inpatient care in a medical facility or continuing treatment by a medical care provider.

**Serious illness or injury** – (in the case of a member of the Armed Forces) Illness or injury incurred in the line of duty.

**Spouse** - Husband or wife as defined and recognized under State law, including common law marriage in States where recognized.

**Qualifying exigency** - Leave to address the most common issues that arise when a military member is deployed to a foreign country, such as attending military sponsored functions, making appropriate financial and legal arrangements, and arranging for alternative childcare. This provision applies to the families of members of both the active duty and reserve components of the Armed Forces.

**Unable to perform** – Health care provider finds the employee is unable to work at all or is unable to perform any one of the essential functions of the employee’s position within the meaning of the Americans with Disabilities Act (ADA).

**Veteran** - A veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness is a *covered veteran* if he or she:

- was a member of the Armed Forces (including a member of the National Guard or Reserves);
- was discharged or released under conditions other than dishonorable; and
- was discharged within the five-year period before the eligible employee first takes FMLA military caregiver leave to care for him or her.

**Amount of Leave Time Blocks and Intermittent/Reduced Schedule Leave**

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Employers do have some choices when it comes to approaching FMLA leave policies. Your school may choose any of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement is available:

- the calendar year
- any fixed 12-month “leave year” (such as fiscal year or employee’s “anniversary date”);
- the 12-month period measured forward from the date any employee’s first FMLA leave begins; or
- a “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

If your school fails to define the method used to determine its 12-month period, the law defaults to whatever calculation is most beneficial to the employee. It is generally better for employers to set the time block for how to “count” FMLA leave as the time block that creates less ambiguity for both the school and the staff member. There are a number of ways that employees may take FMLA leave. Obviously, they may take it as a single block of time. For example, the employee takes three weeks of leave to undergo surgery and allow time for recovery.

The FMLA also permits eligible employees to take leave on an intermittent basis or to work a reduced schedule when there is a medical need for leave and the medical need can best be accommodated through an intermittent or reduced leave schedule. Intermittent leave is taken in separate blocks of time due to a single qualifying event. This kind of leave is available when leave is taken for a serious health condition of the parent, child, for the employee’s own serious health condition, or a serious injury or illness of a covered service member. Examples of intermittent leave include medical appointments, chemotherapy, prenatal exams, or inability to work due to morning sickness.

A variation on the intermittent leave is a reduced leave schedule. This schedule reduces the employee's usual number of days worked per week or reduces the number of hours worked per day. An example of a reduced leave schedule would be an employee who is recovering from an illness or injury and is not strong enough to return to work on a full-time basis.

An important side note is that intermittent or reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval. In terms of tracking, only the amount of leave actually taken while on intermittent or reduced schedule leave may be charged as FMLA leave. Generally, employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave.

There are several FMLA regulations that provide employers with some flexibility. When an employee needs multiple periods of leave for planned medical treatment, such as physical therapy appointments, the employee must try to schedule the treatment at a time that minimizes disruption to the school. Additionally, the school may temporarily assign an employee to an alternative position, with equivalent pay and benefits, which better accommodates the employee's intermittent or reduced leave schedule.
Special Considerations for Leave of “Instructional Employees”
The FMLA has special rules that apply to “Instructional Employees” who take intermittent leave or leave on a reduced leave schedule, or who take leave near the end of the semester. Instructional Employees are only those employees whose principal function is to instruct students in a class, a small group, or an individual setting.

In most cases, these individuals are teachers of some kind, but may include librarians, technology support, or other individuals depending on their teaching obligations. Excluded from this definition are school employees who do not have a principal job of teaching, auxiliary personnel such as counselors, psychologists, or curriculum specialists, and other employees such as bus drivers, cafeteria workers, and maintenance workers. This publication will refer to these employees as teachers, but schools should realize that this definition may extend to any staff member whose principal job includes teaching. Special rules apply to teachers who take either intermittent or reduced schedule FMLA leave, and particularly to those who take leave near the end of a term.

Limitations on Intermittent Leave for Teachers
FMLA leave taken by a teacher for a period that ends with the school year and resumes with the next semester is leave taken consecutively, not intermittently. In other words, the period of summer vacation, when the employee would not have been required to report for duty, is not counted against the individual’s FMLA leave. Further, a teacher who is on FMLA leave at the end of the school year must be provided with any benefits over summer vacation that employees would normally receive if they had been working at the end of the school year.

If a teacher needs foreseeable intermittent or reduced leave to care for a family member, to care for a covered service member, or for the employee’s own serious health condition AND the employee would be on leave for more than 20 percent of the total number of working days over the period leave would extend, the school MAY require the Instructional Employee to choose to either

1) Take leave for a period or periods of a particular duration, not greater than the duration of planned treatment, OR
2) Temporarily transfer the employee to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave.

Note, these rules apply only to leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if a teacher normally works five days per week and needs to take two days of FMLA leave per week over a period of several weeks, these special rules would be applicable. If the leave constitutes 20 percent or less of the working days during the leave period, the employee may not be subject to temporarily transferring to an alternative position.

If an employee fails to give required notice of a foreseeable FMLA leave to be taken on an intermittent or reduced leave schedule, the school MAY require the employee to take leave of a
particular duration OR transfer the individuals temporarily to an alternative position. The school MAY require the employee to delay taking leave until the notice provision is met.

Schools should also note that the determination of how an employee is restored to “an equivalent position” upon return from FMLA leave will be made on the basis of “established school policies and practices.” The established practices must be in writing, must be made known to the employee prior to taking FMLA leave, and must clearly explain the employee’s restoration rights upon return from leave.

Limitations on Leave Taken near the End of the Semester
There are also special rules for teachers who begin FMLA leave of more than five weeks, less than five weeks, and less than three weeks before the end of a term. These rules allow the school to require the employee to continue taking leave, usually for the purpose of not disrupting class learning by having teachers coming and going so close to break.

**Teacher begins leave more than five weeks before the end of the term:**
The school may require the Instructional Employee to continue taking leave until the end of the term if,

1. the leave will last at least three weeks, and
2. the employee would return during the three-week period before the end of the term.

**Teacher begins leave for a purpose other than the employee’s own serious health condition during the five-week period before the end of the term:**
The school may require the Instructional Employee to continue taking leave until the end of the term if,

1. the leave will last more than two weeks, and
2. the employee would return during the two-week period before the end of the term.

**Teacher begins leave for a purpose other than the employee’s own serious health condition during the three-week period before the end of the term**
The school may require the Instructional Employee to continue taking leave until the end of the term if the leave will last more than five working days.

Counting FMLA Leave and Return
As a general rule, FMLA leave is fairly easy to count. Regulations released in 2009 clarified holiday “counting.” When an employee takes leave in increments of less than a full workweek and a holiday falls within that partial week, the hours the employee did not work on the holiday cannot be counted as used FMLA leave. However, where the leave is taken in increments of one workweek or longer, the hours not worked on the holiday are counted as used FMLA leave. (29 CFR § 825.200(h)).

Beyond this basic approach, intermittent leave taken by a teacher or situations where a school requires a teacher to use more leave at the end of a term provide special issues. If a teacher opts to take leave for “periods of a particular duration” (instead of temporary transfer to a similar position) in the case of intermittent or reduced schedule leave, the entire period of leave will count as FMLA leave. However, when the school requires a teacher to take leave until the end
of an academic term, only the period of leave until the employee is ready and able to return to work will be counted as FMLA leave. The policy behind this approach is that the school has the option of not requiring the employee to remain on leave until the end of the term, and therefore, any additional leave required by the school should not be counted against the employee’s FMLA leave entitlement.

Substitution of Paid Leave
Generally, FMLA leave is unpaid leave. However, employees may choose, or the school may require, the use of accrued paid vacation or personal leave for any of the situations covered by FMLA. In other words, the school need not offer both the unpaid leave of FMLA and the school’s paid leave. For example, if an employee is out for one week recovering from surgery, and has two weeks of paid vacation saved up, the school can require the employee to use one week of vacation time for FMLA leave. When an employee uses paid leave for an FMLA covered reason (whether at employee’s or school’s request), employee leave time is still protected by the FMLA.

If an employee has sick time, vacation time, personal time, etc., saved up, and the employee wants to use that leave time, along with FMLA leave, to continue to get paid, the employee may do so if it comports with the employer’s policies. In order to use such leave, the employee must follow the school’s normal leave rules, such as submitting a leave form or providing advance notice.

Even if an employee does not want to use paid leave, the school can require the employee to use it during FMLA leave. For example, if an employee is out for one week recovering from surgery, and has two weeks of paid vacation saved up, the school can require the employee to use one week of vacation time for FMLA leave. When an employee uses paid leave for an FMLA covered reason (whether at employee’s or school’s request), employee leave time is still protected by the FMLA.

Employer Notice Requirements
Schools, like all other employers, have four major notice requirements they must meet under the FMLA. Summaries and links to further materials are provided below. Most of the language provided in this section is from the federal regulations as they are fairly thorough. The Department of Labor provides prototypes of these notices for employers on its website: http://www.dol.gov/compliance/guide/fmla.htm.

General Notice
All covered employers must display, in plain view, the FLMA poster, notifying all workers of the FMLA provisions and providing information concerning how to file a complaint with the Wage and Hour Division (WHD). Note, even schools that have no eligible employees must display this poster. An employer who willfully violates this posting requirement may be assessed a civil money penalty of $110 for each separate offense. Schools may post the Wage and Hour Division’s FMLA Poster, which is available at no cost from the WHD website at www.dol.gov/whd/fmla, to satisfy this requirement, or they may use another format so long as the information provided includes, at a minimum, all the information contained in the FMLA Poster.
If a school fails to post the required Notice, the school is prevented from taking any adverse action against the employee, including denying FMLA leave for failing to furnish the employer with notice of a need to take FMLA leave. (29 CFR 825.300)

All schools that also have eligible employees must also provide a general notice containing the same information that is on the poster in its employee handbook (or other written material about leave and benefits). If no handbook or written leave materials exist, the school must distribute this general notice to new employees upon hire. Schools may meet this general notice requirement by either duplicating the general notice language found on the FMLA Poster or by using another format so long as the information provided includes, at a minimum, all the information contained in the FMLA Poster.

The poster may be posted electronically and the general notice may be distributed electronically provided all other requirements are met.

**Eligibility Notice Requirements**

When an employee requests FMLA leave or the school becomes aware that the leave may be for an FMLA qualifying reason, the school must notify the employee, within five days, absent extenuating circumstances, of the individual’s eligibility to take FMLA leave. The school must determine employee eligibility and provide notice of eligibility status the first time the employee takes leave for an FMLA qualifying reason in the employer’s designated 12-month leave year.

The Eligibility Notice may be either oral or in writing and must:

- Be provided within five business days of the initial request for leave or when the employer acquires knowledge that employee leave may be for an FMLA qualifying reason;
- Inform the employee of his or her eligibility status; and
- If the employee is determined not to be eligible for FMLA leave, state at least one reason why the employee is not eligible.

The Eligibility Notice is not required for FMLA absences for the same qualifying reason during the same leave year or for FMLA absences for a different qualifying reason where the employee’s eligibility status has not changed. However, if the employee requests leave for a different qualifying reason in the same leave year and the employee’s eligibility status has changed, the school must notify the employee of the change in eligibility status within five business days.

**Rights and Responsibilities Notice Requirements**

Each time the school is required to provide the Eligibility Notice, it must also provide employees with a Rights and Responsibilities Notice, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations.

The Rights and Responsibilities Notice must be in writing and must include, as appropriate:

- Notice that the leave may be counted as FMLA leave;
• A definition of the 12-month period the school uses;
• Whether the employee will be required to provide medical certification from a health care provider and the consequences for failure to do so;
• Information regarding the employee’s right to substitute paid leave, whether the school will require the substitution of paid leave, the conditions related to any substitution, and the employee’s entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
• Any requirements for the employee to make any premium payments to maintain health benefits and the arrangements for making any premium payments and consequences for non-payment of premiums;
• Notice of designation as “key” employee and what that could mean;
• The employee’s right to job restoration and maintenance of benefits; and
• The employee’s potential liability for payment of health care premiums paid by the school during the employee’s unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

The Rights and Responsibilities Notice may be provided electronically if all other requirements are met. Employers may use the free Form WH-381 to provide notice of eligibility and rights and responsibilities. It is available at the WHD website at www.dol.gov/whd/fmla.

Designation Notice Requirements
Another of the school’s notice requirements is the “designation notice.” The school is responsible for designating leave as FMLA-qualifying and giving notice of the designation to the employee. This notice essentially starts the clock running on the FMLA leave. The notice must:

• Be provided in writing within five business days, absent extenuating circumstances, of having enough information to determine whether the leave is FMLA-qualifying;
• Be provided for each FMLA-qualifying reason per applicable 12-month period (additional notice is required for any changes in the designation information);
• Include the school’s designation determination, and any substitution of paid leave and/or fitness for duty requirements; and
• Provide the amount of leave that is designated and counted against the employee’s FMLA entitlement, if known. If the amount of leave is not known at the time of the designation, the school must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period.

If the requested leave is not FMLA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA leave.

If the school is unable to determine whether leave should be designated as FMLA-protected because the employee’s information is incomplete or insufficient, the school must state in writing what additional information is needed. The school may use the designation notice to inform the
employee that the information is incomplete or insufficient and identify what else is needed to make the certification complete and sufficient.

Schools may use Form WH-382, which is available at no cost from the WHD website at www.dol.gov/whd/fmla, to provide this designation notice.

Language of Notices

Schools may also be required to provide notices in languages other than English where a significant portion of the employer’s workforce is not literate in English.

Schools are also required to comply with all applicable requirements under federal or state law for notices provided to sensory-impaired individuals.

Employer Consequences of Failure to Provide Notice

All of these notices can be hard to keep on top of, particularly if an employee has a recurrent condition, or a series of situations that present themselves. However, failure to follow the notice requirements may be construed as an interference with, restraint, or denial of an employee’s FMLA rights. This kind of interference may make a school liable for compensation and benefits lost for actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement promotion, or any other relief tailored to the harm suffered. In short, schools ignore the regulatory notice labyrinth at their own risk.

Employee Notice Requirements

The notice requirements are not solely the burden of the school under the FMLA. The employee also has obligations under the law, including letting the school know that leave may fall under the FMLA, giving advanced notice when leave is reasonably foreseeable, and letting the school know as soon as practicable for leave that is not reasonably foreseeable. These notice provisions are provided below. The school may waive employees’ notice requirements if it so chooses. The school may also require the employee to comply with the school’s usual notice requirements for requesting leave, barring unusual circumstances that can occur if a staff member has an emergency. For example, if a school requires all vacation requests to be approved a week or more in advance, FMLA leave requests could also fall under this requirement. In this situation, unless there are extenuating circumstances that would keep an employee from complying with this notice, FMLA-protected leave may be delayed or denied.

Designation Notice

As an initial matter, the school needs to be given notice that the employee needs FMLA leave. An employee does not need to expressly assert rights under the FMLA or even mention the Act to provide sufficient notice to the school.

However, the employee must provide at least verbal notice that is sufficient to make the school aware that the employee needs FMLA-qualifying leave, as well as the anticipated timing and duration of the leave. The school is expected to obtain any additional required information through informal means. An employee has an obligation to respond to the school's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable school inquiries regarding the leave request may result in denial of FMLA protection.
if the school is unable to determine whether the leave is FMLA-qualifying. Beyond these basic requirements, the employee must also satisfy the notice requirements for foreseeable or unforeseeable leave found below.

Once a school has received the designation notice and provided FLMA-protected leave to an employee, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave if using the same reason again. Calling in “sick” without providing more information is not considered sufficient notice to trigger the school's obligations under the Act.

**Intermittent and Reduced Schedule Leave Requests**

Often, schools find themselves having conversations about intermittent leave or reduced schedules at the same time they receive the “designation notice.” As discussed earlier, intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee must inform the school, at its request, of the reasons why such a schedule is necessary. Under the regulations, the employee and the school must attempt to work out a schedule for the leave so that employee's needs are met without unduly disrupting the school’s operations. Obviously, these plans are subject to the agreement from the health care provider, if appropriate. Schools should revisit the guidance earlier in this publication related to intermittent or reduced leave schedules for teachers.

**Notice Requirements - Foreseeable FMLA leave**

If an employee has a foreseeable leave coming up, the employee must provide the school at least 30 days’ advance notice before FMLA leave is to start. This is the case for foreseeable leave based on birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member. If 30 days’ notice is not practicable, usually due to some ambiguity about when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For foreseeable leave due to a qualifying exigency, the employee must provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable.

Employees need to give notice only once, even if the leave is going to be taken intermittently or on a reduced schedule basis. The employee must advise the school, however, as soon as practicable if the scheduled dates are changed or extended. In those cases where the employee is required to provide 30 days’ notice of foreseeable leave and fails to do so, the school may request an explanation for why notice was not given and the employee must respond.

**Employee Notice Requirements - Unforeseeable FMLA leave**

Of course, not all FMLA leave is foreseeable. When this is the case, the law expects the employee to provide notice to the school as soon as practicable, given the facts and circumstances of the particular case. In these situations, the employee should provide enough information for the school to determine whether the FMLA leave applies to the request.

Even if the leave is not foreseeable, an employee must generally comply with the school's standard requirements for requesting leave, unless there are unusual circumstances to justify not meeting these requirements. For example, a school may require employees to contact a specific
individual at least 48 hours in advance to request leave. If an employee is in a car accident and requires emergency medical treatment, he or she is exempted from such notice requirements. However, if an employee does not comply with the school's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

Employee Failure to Provide Notice
If the school does not waive the employee notice requirements, there can be consequences when the employee fails to give notice. Before an employer can take action, the school must be sure that the employee had actual notice of his or her FMLA obligations. This condition is satisfied by the school's proper posting of the required notice at the worksite where the employee is employed, as well as the school's provision of the required notice in either an employee handbook or through distribution to all employees.

Foreseeable leave—30 days
When the employee fails to give timely advance 30-day notice for foreseeable leave, the school may delay FMLA coverage until 30 days after the date the employee provides notice. For such a delay, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave.

Foreseeable leave—less than 30 days
When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable, the extent to which the school may delay FMLA coverage for leave depends on the facts. For example, if an employee reasonably should have given the school two weeks’ notice but instead only provided one week’s notice, then the school may delay FMLA-protected leave for one week.

Unforeseeable leave
When the need for FMLA leave is unforeseeable and an employee fails to give notice, the extent to which a school may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the school notice of the need for leave very soon after the need arose, consistent with the school's policy, but instead, the employee provided notice two days after the leave began, then the school may delay FMLA coverage of the leave by two days.

Waiver of notice
A school may waive employees' FMLA notice obligations or the school's own internal rules on leave notice requirements. If a school does not waive the employee's obligations under its internal leave rules, the school may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave.

School’s Record-Keeping Requirements Under FMLA
Schools with covered employees must maintain records that disclose the following information:

- Basic payroll and identifying employee data;
• Dates FMLA leave is taken and leave must be designated as FMLA leave;
• If leave is taken in increments less than one full day, the hours of the leave;
• Copies of the employee notices of leave furnished to the school under FMLA;
• Any documents describing the employee benefits or school policies and practices regarding the taking of paid and unpaid leave;
• Premium payments and employee benefits; and
• Records of any dispute between the school and eligible employee regarding designation of leave.

Schools without covered employees must keep records of basic payroll and identifying employee data.

Conclusion
FMLA leave provides a protected status to employees who need it. Although many employers, including schools, struggle to piece together the various duties and obligations that must be met even when employees are out on leave, it is important to remember that the United States remains far behind most other developed countries when it comes to providing paid leave to parents and individuals recovering from illness and other life-altering setbacks. Schools should work to help employees through these events, with the federal mandated protection as well as any paid benefits the school may be able to offer given its individual circumstances. Such loyalty on the behalf of the school engenders further loyalty from staff, serving as an important incentive for employees to stay.

More Resources
Department of Labor www.dol.gov
Department of Labor FMLA Compliance Site http://www.dol.gov/compliance/laws/comp-fmla.htm