How Healthy Is Your Sick Leave Pool?

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Sick leave pools and banks provide employees a type of short-term disability protection, theoretically without a monetary investment by the employee or the district. Although the private sector rarely provides this employee benefit, sick leave pools/banks are relatively common in the public sector and are, in some cases, even allowed or required by state statute.[1] However, due to collisions with a number of federal and state laws, many attorneys view sick leave pools/banks as a ripe source of litigation and liability. This article will help districts diagnose potential problems with sick leave pools/banks and discuss remedies.

What is a Sick Leave Pool?

Although there is no universal definition of a "sick leave pool," for the purposes of this article it is an employee benefit where employees are given an opportunity to donate paid leave days to a reserve for the use of all employees choosing to participate. Employees who are members of the pool may be granted paid leave days from the reserve in the event the employee is unable to work due to illness or injury and uses all of his or her accumulated paid leave days. Some sick leave pools allow for leave when a member of the employee's immediate family is ill or incapacitated as well. Sick leave banks are similar to sick leave pools except that employees granted leave from the bank are required to pay back the days taken, either by a withdrawal from salary or a donation of paid leave days when the employee accumulates more in the future.

Eligibility Issues

The largest concern by far is the potential for illegal discrimination when deciding whether an employee is eligible to draw leave from the pool/bank. To maintain the viability of the pool/bank concept, districts need to keep usage low. Districts attempt to do this by limiting the types of conditions that qualify for pool/bank days or by turning over governance of the pools/banks to committees of employees who are members of the pool, in hopes that those employees will discourage overuse or abuse of the pool. However, the denial of leave from a sick leave pool or

[1] *See* Ala. Code §16-22-9 (2010)(Must create sick leave bank if 10 percent of staff request); Alaska Stat. §14.14.105 (2010)(Board may establish a sick leave bank); Ark. Code Ann. §6-17-1208 (2010) and §6-17-1306 (2010)(District may establish a sick leave pool or bank); Fla. Stat. §1012.61(2010)(District may establish a sick leave pool); Ga. Code Ann. §20-2-850(Board may establish a sick leave bank or pool); Ky. Rev. Stat. Ann. §161.155 (2010)(Board may create a sick leave bank); N.J. Stat. Ann. §18A:30-10 (2011)(Board may establish a sick leave bank if majority representatives of employees agree); N.C. Gen. Stat. §115C-336 (2010)(State Board of Education will adopt rules for the establishment of sick leave banks); Tenn. Code Ann. §49-5-802-810 (2010)(Tennessee Teacher's Sick Leave Bank Act).

bank can be an adverse employment action,[2] which means that eligibility determinations can easily become the subject of a discrimination lawsuit.

Discrimination on the basis of a disability, in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, is a primary concern, particularly since these laws were recently amended to significantly broaden the definition of a "disability" to cover even more conditions.[3] Many pools/banks attempt to limit usage to "serious" or "catastrophic" conditions, without defining these terms, forcing those administering the program to decide which conditions qualify. Needless to say, such circumstances are breeding grounds for well-intentioned district staff to refuse this paid leave benefit to employees solely on the basis of their medical condition.

However, the ADA and Section 504 are not the only legal concerns. Many sick leave pools/banks explicitly prohibit employees from using pool/bank days for pregnancy-related absences, under the theory that pool/bank days should be reserved for extraordinary events and that pregnancies are so common they could easily bankrupt the reserve. These exclusions violate Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 which states, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ." *42 U.S.C. §2000e(k.)*[4]

The method of pool/bank administration sometimes heightens the risk for discrimination as well. Many pools/banks are overseen by a committee made up of untrained, non-administrative employees who are members of the pool/bank. These committees review requests for leave and make eligibility decisions. However, without guidance these committees could easily consider inappropriate factors when making a decision, such as the age, race, or gender of the employee, in violation of Title VII, Title IX of the Education Amendments of 1972, and the Age Discrimination in Employment Act.

Coordination with Workers' Compensation

Districts need to explicitly address in sick leave pool/bank policies whether employees are eligible when the illness or injury qualifies the employee for workers' compensation benefits.

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[2] Casale v. Reo, 522 F.Supp.2d 420, 427 (N.D.N.Y. 2007); Pfeiffer v. Lewis Cnty., 308 F.Supp.2d 88, 109 (N.D.N.Y. 2004).
[3] See ADA Amendments Act of 2008, P.L. 110-325, 122 Stat. 3553 (2008).
[4] For example, in U.S. v. Bd. of Educ. of the Consol. High Sch. Dist. 230., 983 F.2d 790 (7th Cir. 1993) the court found the district's sick leave bank discriminatory on its face because it provided additional leave for "prolonged and extended catastrophic illness," but explicitly excluded pregnancy. The Board had approved sick leave bank leave for a broad range of conditions such as cancer, gall bladder surgery, back strain and a broken leg, but routinely denied claims for pregnancy-related absences.

Allowing employees to collect both benefits could result in a windfall for the employee and a disincentive for the employee to return to work.[5] When making these decisions, districts should remember that workers' compensation awards are not taxable income, so even though the award may be less than the employee's gross wages, the net wages may not be very different.[6]

It is also a good idea to address situations where a workers' compensation award is being litigated. Ideally, the paid leave is conditionally provided, pending the result of the litigation. For example, in Bailey v. Blumenthal, 2003 WL 356777 (Conn. Super. Ct. 2003) the sick leave bank required employees involved in a contested workers' compensation claim to assign any award received to the bank.

Coordination with the Family and Medical Leave Act

Because sick leave pools/banks are typically activated within a few weeks of an employee's illness or injury, employees seeking additional paid leave may simultaneously qualify for protection under the Family and Medical Leave Act (FMLA). It is essential that the district's policies coordinate with FMLA obligations.

Unfortunately, the existence of additional paid leave under a sick leave pool/bank frequently results in delayed notification of FMLA rights. Many district administrators do not remember the FMLA – and the paperwork that goes with it – until after the employee has exhausted all paid leave options. Some administrators are also under the false assumption that the FMLA does not apply unless an employee explicitly requests it.[7] Needless to say, employees are more interested in paid leave options than unpaid FMLA leave and only consider FMLA entitlements after all paid leave resources are exhausted and the employee risks losing employment or health insurance benefits.

Although the employee is not typically harmed by this delay, the district may be. The district is subject to FMLA regulations – and at risk of an FMLA lawsuit – until the district has clearly designated and provided the employee his or her rights under the FMLA. After FMLA leave is exhausted, the district is free to rely on its own policies, not federal law, which means it benefits the employer to begin the FMLA clock ticking as soon as possible.

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[5] In United Envtl. Workers v. Buffalo Sewer Auth., 115 A.D.2d 974 (N.Y. App. Div. 1985) the court upheld an arbitrator's award of sick leave bank days to an employee even though the employee collected workers' compensation benefits for those same days.

[6] *See* 26 U.S.C. §104(a)(1).

[7] FMLA regulations make it clear that an employee "does not need to expressly assert rights under the Act or even mention the FMLA" to effectively provide notice to the district. *29 §C.F.R. 825.301(b).* The district has an affirmative obligation to designate leave taken as FMLA-qualifying and in situations where the employer does not know the reasons for the leave, the employer is required to ask more questions to determine if FMLA is implicated. *29 C.F.R. §825.301(a).*

Further, if the district waits until all accumulated leave and pool/bank leave has been exhausted to designate leave as FMLA-qualifying, the district may have already given well over 12 weeks of paid leave to the employee. FMLA leave may be retroactively designated - but only in situations where the failure to timely designate "does not cause harm or injury to the employee." *29 C.F.R. 825.301(d).*[8] To avoid claims for additional leave and potential litigation over whether or not the employee suffered "harm," districts are better off starting the FMLA clock ticking at the beginning of the leave, as opposed to attempting to retroactively designate the leave. This means if a district has a sick leave pool/bank, administrators need additional training on identifying leaves that qualify for FMLA sooner, and certainly should consider FMLA if pool/bank leave is requested.

Collecting and Using Information

Many sick leave pool/bank policies require employees to disclose to the district information about the employee's illness or incapacity, some even going so far as to ask for medications the employee is taking, a list of the doctors the employee has seen and medical files. Many of these pools or banks also require employees to agree to submit to an examination by a physician of the district's choosing or to sign a release so that the district can obtain even more information about the employee's medical problem. This proliferation of medical information is another source of liability.

FMLA

FMLA regulations are extremely specific as to the type of medical information that may be collected and prohibit employers from requesting more information than is allowed under the law to verify FMLA leave.[9] In addition, follow-up questions are prohibited except for purposes of clarification or authentication and employers may only request a second opinion if the employer "has reason to doubt the validity of a medical certification." *29 C.F.R. §825.307(b).* Many sick leave pools/banks would clearly violate these standards in a situation where the employee is simultaneously eligible for FMLA protection and pool/bank days.

The good news is that the FMLA regulations do allow employers to request additional information if necessary for eligibility for paid leave in accordance with the district's policy –

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[8] According to the regulations, "harm" does not occur if the employee's serious health condition prevented the employee from returning to work, regardless of the designation. However, if the employee would have delayed a procedure or otherwise not taken leave had the employee known it would have reduced the FMLA entitlement for a later event, the employee may be able to show "harm." *See 29 C.F.R.§825.301(3).*
[9] *See* 29 C.F.R. §825.306(a), (b).

but only if the district "informs the employee that the additional information only needs to be provided in connection with" the paid leave benefits – not for FMLA eligibility. *29 C.F.R. §825.306(c).* This means that district policies and forms should minimally clarify to employees that failure to provide medical information above and beyond what is allowed under the FMLA will not impact their FMLA rights. However, a wiser course of action, as discussed below, may be to piggyback sick leave pool/bank eligibility with the FMLA paperwork.

ADA

While districts may be able to escape liability under the FMLA, the ADA and regulations also limit employer medical inquiries and examinations.[10] Although less specific than the FMLA regulations, EEOC guidance interpreting ADA regulations makes it clear that employers may only ask for documentation that is sufficient[11] to substantiate that a medical condition exists. Employers may only require an employee to see a physician of the employer's choice if the employee has provided insufficient documentation and has been given an opportunity to clarify the issue first.

Many sick leave pool/bank policies and related forms clearly violate this standard. Districts may want to simply rely on the FMLA process for both FMLA verification and sick leave pool/bank eligibility. This ensures compliance with both the FMLA and ADA, and minimizes paperwork for both the district and the employees, who in many cases are also eligible for FMLA protection.

GINA

Districts must ensure that any medical forms associated with sick leave pools/banks comply with the Genetic Information Nondiscrimination Act (GINA)[12], which prohibits employers from requesting genetic information from employees, with some exceptions. "Genetic information" includes family medical history as well as specific genetic tests. Although districts are typically not interested in this type of information, employees and their health care providers may inadvertently provide genetic information when filling out forms for FMLA and sick leave pool/bank eligibility. GINA regulations make it clear that employers will not be penalized if

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[10] *See* 42 U.S.C. §12112(d); 29 C.F.R. §1630.14(c).

[11] "Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed." Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited March 9, 2011).

[12] 42 U.S.C. §§ 2000ff – 2000ff-11

they inadvertently receive genetic information in the normal course of business in response to a lawful request for medical information.[13] Because the request for medical information must be "lawful," GINA is an additional incentive for the district to only collect medical information or require medical examinations in accordance with the FMLA and ADA regulations.

To prevent inadvertent disclosures and to create a "safe harbor" for employers, the EEOC recommends that employers add specific language to medical forms to make it clear to the employee and the employee's physician that the district is not interested in genetic information.[14] All sick leave pool/bank medical forms should include the EEOC's suggested language.

Confidentiality of Information Collected

Once information is lawfully collected, there are legal concerns regarding which employees have access to the information. As stated previously, leaving eligibility decisions to committees is fraught with risk. Disclosing medical information to these groups may also violate the law. ADA regulations allow employers to make medical inquiries in some circumstances, but require that the information is kept confidential and is only provided, when appropriate, to supervisors and managers to facilitate accommodations, first aid and safety personnel if emergency treatment may be needed, and government officials investigating compliance with the law (the EEOC).[15] The FMLA and GINA regulations limit access to these same persons.[16] Unless these sick leave pool/bank committees rise to the level of supervisory staff, disclosure to these groups arguably violates the law.

Even if medical information is legally shared with committees administering sick leave pools/banks, it is not wise to do so. One of the many reasons medical information is kept confidential and separate from other information in personnel files is to eliminate the potential that employment decisions are made on the basis of this information. The more employees who have access to medical information, the easier it is for a disgruntled employee to claim that the medical information was inappropriately used and more difficult for the district to prove otherwise.

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[13] 29 C.F.R. §1635.8.

[14] "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services." 29 C.F.R.§1635.8(b)(1)(i)(B).

[15] 29 C.F.R. §1630.14.

[16] 29 C.F.R. §825.500(g); 29 C.F.R. §1635.9(a)(2).

Ending a Limitless Benefit

Some employees suffer from medical conditions from which they may never recover sufficiently to perform the essential functions of the job, and the availability of sick leave pool/bank days simply delays the inevitable termination date. These situations are complicated further when a sick leave pool/bank does not cap the number of paid days an employee may receive. Terminating an employee is always a litigation risk, but becomes even more problematic when the district is forced to arbitrarily decide when benefits should end.

Ending the Pool/Bank

Many districts forget to address how to end or dissolve the pool/bank in the policy or collectively bargained agreement that created the benefit. Whether employees have a property right to the days contributed, or the monetary equivalent, is debatable. However, employees will certainly raise the issue if the pool/bank is ever dissolved or changed significantly.[17] To avoid future conflict, it is wise to add a provision that explains how accumulated days will be distributed – or if they will be distributed – if the pool/bank ends.

Practical Solutions

With all of these pitfalls, it is easy for attorneys to advise against sick leave pools/banks. But the political and practical reality is that many are already in existence and are difficult to end unless replaced with an equal – and likely costly – substitute. Therefore energy might better be spent on improving the existing pool/bank. Here are some considerations:

1. **Eliminate the committee or minimize its direct involvement.** Eligibility decisions should only be made by trained human resources staff, preferably in coordination with any FMLA paperwork. A committee of pool members may provide broad oversight of the policy and the number of days collected or remaining in the pool, but should not have access to the medical information of individual employees or involvement in the eligibility decisions.
2. **Exclude employees who qualify for workers' compensation benefits.** Also, explicitly address situations where these benefits are being litigated.
3. **Limit eligibility decisions to "serious health conditions" under the FMLA.** This further coordinates the pool/bank with the district's FMLA obligations and gives a relatively well-defined legal standard for eligibility that is already recognized under federal law.

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[17] Chautauqua Cnty. Sheriff's Employee's Ass'n v. Chautauqua Local 807, 482 N.Y.S.2d 690 (N.Y. Sup. Ct. 1984). (When employees voted to be represented by a different union, the court used equitable powers to order transfer of sick leave bank funds from the previous union to the new union.)

4. **Require employees to take unpaid leave first.** The downside to relying on the FMLA definition of a "serious health condition" is that it is relatively easy for conditions to qualify for FMLA protection. Employees may abuse the pool/bank and ultimately bankrupt it. One solution is to require employees to not only exhaust their own paid leave, but also to take a week or more of unpaid leave before becoming eligible for pool/bank days. This discourages abuse and limits pool/bank days for longer-term illnesses without overtly discriminating based on the employee's medical condition.
5. **Rely on the FMLA eligibility forms.** By relying on the FMLA forms already in existence, the district prevents duplication of medical information, guards against excessive collection of medical information, and will likely provide more timely FMLA notice to employees.
6. **Add the EEOC-recommended language under GINA regulations to all forms requesting medical information.**
7. **Cap the amount of leave one employee may utilize.** At some point in time, seriously ill or injured employees will need to transition to retirement disability or other social services. This cap can vary depending on an employee's years of service, but no sick leave pool/bank should offer limitless leave.
8. **Include a provision that addresses how the pool/bank will be dissolved if ever necessary.** Many districts now see the value of paid short-term disability insurance policies. Be prepared in case your district ever makes the transition.