



MATERNITY LEAVES: Disability and Child Care

Maternity leave is a common employee benefit which has been uncommonly difficult to administer. Boards of education have seen their local policies and negotiated agreements superseded by statutory interpretations and have been frequently perplexed as to which employees are entitled to what benefit. In addition, the enactment of state and federal laws addressing family leave further complicated the administration of employees' maternity leave benefits.

The confusion over maternity leaves can be somewhat alleviated by looking at the leave as containing two separate, but sometimes connected, components. Maternity leave consists of: a disability period during which a female employee is disabled by pregnancy and the delivery of a child; and a child care component during which the employee is on leave to care for the newborn child. The two components of maternity leave are governed by different sets of legal expectations; when a district's leave provision blurs these separate components, implementation of the leave becomes burdensome.

Boards of education would, therefore, be well-served by negotiating separate provisions for disability leaves and child care leaves. This article will explore the possibilities of such negotiations in the context of legal requirements and in achieving a balance between the rights of employees and those of their employers.

Legal Requirements of Disability Leaves

Employees' entitlements to disability leaves are addressed in the federal Family and Medical Leave Act as well as in New Jersey statutes. These laws, and clarifying opinions of agencies and the courts, establish the legal framework for negotiations of disability leaves.

The Federal Family and Medical Leave Act (FMLA)

A summary of all the provisions of The Family and Medical Leave Act of 1993 (29U.S.C. 2611 *et seq.*) can be found in "Federal Requirements Affecting Negotiations" article in the Structure of Negotiations section of *The*

Negotiations Advisor. The benefits provided by this law includes the ability of eligible employees to take up to 12 weeks of leave in any 12 month period for their personal "serious health conditions."¹ Pregnancy-related disabilities have been defined as falling into the FMLA's definition and thus, eligible employees can obtain federal leave during the disability period associated with pregnancy. Like other leaves under this law, this federal benefit provides unpaid time off, but requires employers' continuation of group health insurance coverage to employees who are on FMLA leave.

Accordingly, school employees who are eligible for this federal benefit, can supplement their use of paid accumulated sick leave with those provided by the federal medical leave acts.² While employees are on unpaid FMLA leave for their period of disability, a board must continue to provide health insurance under the district's group plans.

New Jersey Statutes

While New Jersey's Family Leave Act does not apply to leaves for personal illness, two other New Jersey laws govern school employees' entitlement to disability benefits.

New Jersey Statutes Concerning Disability Two New Jersey laws govern school employees' entitlement to disability benefits: *N.J.S.A. 18A: 30-1 et seq.*, the sick leave statute in education law and the New Jersey Law Against Discrimination *N.J.S.A. 10:5-1 et seq.*

Essentially, these statutes hold that:

- a school board cannot single out pregnancy as a criterion when adopting any policy, whether it be a sick leave policy, contract renewal policy, or any other policy;
- sick leave must be granted to teachers who are disabled due to pregnancy on the same basis as it is granted for other types of disabilities.

These two principles have guided case law development in the area.

Case Law: The Pregnancy Disability Period The Commissioner of Education has held that disability resulting from pregnancy is an illness under the sick leave statute. Teachers who are pregnant must be allowed to

¹ Note, this leave for personal illness is not available under *N.J.S.A. 34: 11B-1 et seq.*, New Jersey's Family Leave Act.

² See later discussion in this article on "Negotiating Disability and Child Care Leaves."

utilize accumulated sick leave while they are disabled due to pregnancy.³

In *Cinnaminson Township*, the Commissioner stated that normally a pregnancy related disability can be presumed to exist one month prior to the birth of the child and one month subsequent to the birth. Therefore, a non-specific doctor's certificate, indicating the anticipated delivery date, should satisfy the board's need for medical certification of disability during this two-month period.

If, however, a teacher requests a disability leave outside the parameters of presumed disability, a board can require additional certification to verify that the teacher: is not able to work in earlier months of the pregnancy; is capable of working through the ninth month; wants to return sooner than the one month presumed post-delivery disability period; or is disabled more than one month post-delivery.

Therefore, during the period of a pregnancy-related disability, the employee is entitled to take leave and to be paid for the number of her accrued accumulated sick leave days. This paid sick leave entitlement, however, is available only for the period of disability. Since the sick leave statute requires that sick leave be utilized only for illness and disability, accumulated sick days may not be used for child rearing purposes by a nondisabled employee.⁴

Case Law: The Need for Non-discriminatory Disability Policies A school board may not negotiate, or establish, policies which discriminate against or accord disparate treatment to teachers who are pregnant. In *Castellano*,⁵ the courts found that a mandatory leave of absence which forced a teacher to leave her job at an arbitrary time and not return until a fixed date, solely due to pregnancy, was a violation of the New Jersey Law Against Discrimination. In addition, the courts upheld the Commissioner's interpretation of the sick leave statute to find that a pregnant teacher must be allowed to utilize her accumulated sick leave while she is disabled, to the same extent that such is permitted for other types of disability leaves.

In *Farley v. Ocean Township Board of Education*,⁶ the court held that the Board treated pregnancy differently than other disabilities when it refused to pay two teachers for disability due to pregnancy. In this case, the teachers had been granted an unpaid "maternity" leave pursuant to the contract. When the birth of each teacher's child occurred prematurely, they asked to use sick leave while they were disabled after the birth until their unpaid leaves began. The Board refused their request and instead

made the starting date of their unpaid leaves retroactive to the date of delivery, effectively denying them use of sick time for their actual disability. The court said:

In the instant case, disability due to pregnancy and childbirth has been singled out for disparate treatment; teachers temporarily disabled due to reasons other than pregnancy are entitled to utilize their accumulated sick leave, notwithstanding the occurrence of the disability immediately prior to an unpaid leave of absence.

Because of this disparate treatment, the Board was found to have violated the Law Against Discrimination.

Case Law: Anticipated Disability and Continuity of Education Boards' vital interest in "avoiding, where possible, the interruptions that would arise from teachers' absences"⁷ has been recognized by the courts. Thus, case law holds that boards of education may base their employment decisions on the reasonable need to assure continuity of education. However, considerations of educational continuity cannot violate employees' statutory or constitutional rights.

In applying this principle in *Gilchrist v. Board of Education of Haddonfield*, the Appellate Division upheld the Board's nonrenewal of a nontenured teacher's contract because of her expected childbirth in late September or October of the new school year. The court found that, in this case, the Board's advance notice of an anticipated prolonged absence during the contract year under consideration was a reasonable application of its educational policy as there was no indication of disparate application of the policy. The court stressed, however, that if the policy was not applied evenhandedly to all anticipated extended absences, regardless of their causes, the board's nonrenewal decision would have constituted illegal gender discrimination. The court further noted that the board's legitimate reason for the nonrenewal did not abrogate the teacher's entitlement to reasons for her nonrenewal.

In *Dyson*,⁸ a board policy of regulating the commencement of a pregnancy related disability leave was upheld. In this case, the board rejected the teacher's request to begin her disability leave sometime in October and placed her on an involuntary unpaid leave of absence with the start of the school year. The board believed that the teacher's requested leave would damage the district's educational continuity; it held that allowing the pregnant teacher to work 4-6 weeks at the beginning of the school

³ *Cinnaminson Township Board of Education v. Silver*, 1976 S.L.D. 738, aff'd State Board 1979 S.L.D. 817., *Hynes v. Bloomfield Board of Education*, 1980 S.L.D. 698, aff'd 190 N.J. Super 36, 1983.

⁴ *Hackensack Board of Education*, 184 N.J. Super. 358 (1982).

⁵ *Castellano v. Linden Board of Education*, 79 N.J. 407 (1979).

⁶ *Farley v. Ocean Township Board of Education*, 174 N.J. Super. 449 (App. Div. 1980), cert. denied 85 N.J. 140 (1980).

⁷ *Gilchrist v. Board of Education of the Borough of Haddonfield*, 155 N.J. Super. 358 (1976).

⁸ *Dyson v. Montvale Board of Education*, 1980 S.L.D. 883, aff'd. App. Div. Docket No. A-3182-80T1, February 8, 1982.

year and then to be replaced by a substitute until the semester break, when the teacher indicated she would return, would not be educationally sound. The court supported the board's position as it found that: the decision was designed to preserve educational continuity; the policy was applied in a non-discriminatory manner; and the teacher was allowed to utilize her accumulated sick leave during the period of her disability.

Case Law: Use of Accumulated Sick Leave During Disability The use of accumulated sick leave, governed by the statutory definition of sick leave, is limited to situations which involve the individual employee's personal illness or disability. An interpretation of this statute led the *Hackensack* court to conclude that accumulated sick leave days cannot be used for other purposes. Further, the State Board of Education has also held that school employees do not have an automatic entitlement to use accumulated sick leave at any point in time. Specifically, the State Board held that an employee on an unpaid leave of absence does not have a statutory entitlement to the use of accumulated sick leave.⁹ Rather, in *Logandro*, the State Board ruled that the issue of what benefits are due to employees during unpaid leaves of absence is, in the absence of specific statutory requirement, mandatorily negotiable. Thus, boards may negotiate provisions for leaves of absence which are available for a period of time which exceeds the disability period; under these circumstances, employees opting for a voluntary unpaid leave of absence cannot automatically expect to be eligible to use their accumulated sick leave days, unless the negotiated provision specifically includes a local agreement for this benefit.

The Appellate Division has also upheld a board's denial of a request for paid disability due to the delivery of a child during an unpaid leave of absence.¹⁰ In *Headley*, the court found that the board's policy was applied nondiscriminatorily as a male employee on an unpaid leave of absence would also have been ineligible for paid disability.

Boards of education, however, must give employees full information as to the available leave options. For example, in *Logandro*, the State Board held that an employee must be given a choice of taking an unpaid leave before the period of disability or working until the disability period, utilizing sick days, and then taking an unpaid leave to care for the newborn child.

Case Law: Continuation of Health Insurance Coverage During Use of Accumulated Sick Leave The State Board of Education, affirming a Commissioner's decision, has held that an employee who is using accumulated sick leave for a pregnancy related disability cannot be denied insurance coverage.¹¹ Accordingly, a board that had terminated a teacher's insurance coverage during this

time was ordered to reimburse the teacher for the costs of an alternative coverage the teacher had obtained as a result of the board's inappropriate denial of insurance benefits.

Implications for Local Boards

Local negotiations of disability provisions cannot contradict established requirements. Boards, therefore, need to assure that their leave conditions comply with all aspects of the law. As such, local administration of leaves for a disability related to pregnancy must be similar to conditions established for any other type leave based on an anticipated disability. Pregnancy related disability leaves cannot be marked by gender discrimination or by any other factor that result in disparate treatment. In addition, the use of accumulated sick leave must be reserved for situations involving personal disability and cannot be applied to other conditions not related to presumed or actual illness.

During the disability period, employees may be paid as they use their accumulated sick leave and receive continued health insurance coverage. Employees can also be eligible for unpaid leave under the FMLA for a period of up to 12 weeks and continue to receive health insurance benefits.

Should an employee request a leave of absence which exceeds the period of presumed or actual disability, a board is not legally required to permit the use of accumulated sick leave when the employee becomes "disabled." However, if in an effort to preserve educational continuity, the board places an employee on an unrequested and *involuntary* leave of absence, the *Dyson* decision appears to create an employee right to use accumulated sick leave during the period that the employee is presumed to be (or is actually) disabled.

Although boards cannot use negotiations to diminish any employee's legal rights, boards can agree to negotiate provisions that grant additional benefits to employees. Nevertheless, these additional benefits cannot contradict the requirements set by law. Therefore, boards cannot agree to permit their employees to use their accumulated sick days for periods where the employee is not considered to be disabled. Other than that, the issue of additional benefits during the "disability" portion of a maternity leave article remain a topic of local negotiations.

Legal Requirements of Child Care Leaves: FMLA and FLA

Up until the enactment of family leave statutes, the only statutory requirement affecting child care leave was the nondiscrimination obligation to grant leave equally to male and female employees.¹² However, the May 1990

⁹ *Logandro v. Cinnaminson Township Board of Education*, 1979 S.L.D. 378, aff'd in part, reversed in part, State Board 1980 S.L.D. 1511.

¹⁰ *Headley v. Board of Education of the Township of Jefferson*, App. Div. Docket No. A-2804-80, November 17, 1981.

¹¹ *Boyle vs. Florham Park Board of Education*, 81 S.L.D. June 11, 1981, aff'd with modification 10/7/81.

¹² *Demes v. Pascack Valley Regional Board of Education*, Division of Civil Rights, February 5, 1976.

enactment of New Jersey's Family Leave Act (*N.J.S.A. 34:11B et seq.*) and the subsequent 1993 enactment of the federal Family and Medical Leave Act (*P.L. 1993, 103-3*) established certain employees' statutory entitlement to leaves of absence for the purpose of caring for family members. The laws' provisions addressing the care of newborn and adopted children have placed legal requirements on certain school districts' negotiated child care leaves.

General Provisions of the Law

The statutes affect school districts that employ 50 or more employees. The state Family Leave Act (FLA) confers 12 weeks of family leave in any 24 month period to employees who have worked more than 1000 base hours during the preceding 12 months. The federal Family and Medical Leave Act (FMLA) covers all boards of education and requires all boards to post notices of federal leave; however, the federal law provides leave entitlement only to employees whose district employs at least 50 employees in a 75 mile radius. Under the FMLA, eligible employees who have worked at least 1,250 hours during the previous 12 months are entitled to 12 weeks of family leave during any one-year period. The provisions of the FMLA cannot diminish any benefits granted to employees under a state family leave law. Thus, boards are required to provide family leave benefits under the law that grants the most generous benefits.

As such, New Jersey boards are required to grant leave under the FLA for the purposes of caring for a newborn or adopted child when an eligible employee files the request for a leave to "commence at any time within a year after the date of birth or placement for adoption."¹¹ Upon the employer's approval, leave to care for a healthy newborn or adopted child need not be taken in consecutive blocks of time but may be scheduled on an intermittent or reduced schedule. However, when the child care leave is taken consecutively, it is scheduled by the employee for any-time during the year. Leave under the laws may be paid or unpaid, but during the period of leave, the employer is required to maintain coverage under any group health insurance that the employee would have received had the employee not been on leave.

Statutory leave under the FLA or the FMLA is also available to eligible employees for the purpose of caring for the serious illness of a child or certain other members of the employee's family. In addition, the FMLA also grants eligible employees leave time for personal illness.

Specific Provisions for School Districts

Federal requirements also include special provisions affecting instructional employees' leave entitlements and school districts' rights and obligations. For example, for the purpose of preserving instructional continuity, boards are given the right to modify instructional staff's requests for reduced or intermittent leaves and to regulate leaves scheduled at the end of an academic year.

However, federal regulations also require boards to recognize instructional employees' normal work year when calculating staff's leave entitlements under the law. (29 CFR 825.6010. Vacation periods, where those employees would not normally be expected to report for work, cannot count against their 12 week entitlement. Therefore, the 12 week entitlement can be interrupted by the summer vacation, and a teacher could, for example, request 8 weeks of FMLA leave at the end of the school year and still have a 4 week entitlement leave under the FMLA at the beginning of the next school year. Note, however, that the ability to regulate the scheduling of certain end-of-the-year leaves discussed above, and lead to exceptions to the vacation rule. Thus, the application of this provision must be carefully reviewed in light of the particular facts surrounding each situation.

Local Boards' Obligations

Boards of education must be aware of, and comply with, their employees' statutory entitlements to child care leaves under both the state and federal family leave acts. Although these laws have been in effect for many years, a clear understanding of employees' entitlements and boards' obligations continues to be an evolving area of case-law development. Differing perspectives and attempts to reconcile the differing provisions of the state and federal laws have led to conflicting interpretations of these statutory rights. Therefore, these laws are still in the process of being clarified by judicial and administrative decisions.

The absence of case law guidance, however, does not insulate boards from the responsibility of complying with their statutory obligations. Boards are still expected to administer their employees' leave entitlements in accordance with the provisions of the family leave acts. For a full discussion of boards' general responsibilities in administering the FMLA, please see the article "Federal Requirements Affecting New Jersey School Negotiations" in the Structure of Bargaining section of *The Negotiations Advisor*.

In addition to these general requirements, New Jersey boards also have the responsibility to coordinate statutory benefits with their duty to negotiate in good faith.

Coordinating Family Leave Statutes and Contractual Benefits

In addition to statutory entitlements, school employees are also eligible for a variety of leaves under their locally negotiated contracts. Understanding the interaction and coordination of employees' statutory and contractual leave benefits is also a responsibility of school management. This has not been an easy task as neither the state nor federal law provides clear guidance as to the interaction of contractual benefits with the unpaid 12 weeks' statutory leave entitlements.

Nevertheless, a number of areas have been clear to all parties. For example, there has been no disagreement that both the federal and state statutes establish a minimum level of benefits that cannot be diminished by

local negotiations. However, a number of other areas have continued to raise troublesome questions that remain largely unresolved by court or agency decisions. Since the rights and obligations imposed by the family leave acts remain a largely unchartered and relatively new area of statutory interpretation, boards and their administrators would be well advised to consult with their legal and labor relations resources before responding to employees' requests for family leave.

Negotiating Disability and Child Care Leaves

Boards must approach negotiations of their disability and child care leaves in the same manner in which they approach all other terms and conditions of employment. Boards must assure that their provisions and proposals support provisions that are protective of the district's interests, within the parameters established by statutes and case law, including the defined scope of negotiations. However, the responsibility to negotiate terms and conditions of disability and child care leaves is complicated since the post-FLA and FMLA scope of negotiations for New Jersey school employees is still in the process of being defined by the courts, PERC and other agencies.

The Scope of Negotiations

Paid and unpaid leaves of absences have long been seen to be a mandatory topic of bargaining in New Jersey's public sector. From the enactment of the family leave laws, it has been clear that these statutes provided a minimum level of employee benefits that could not be reduced by locally negotiated labor contracts. In other words, negotiated contractual clauses could not provide less than 12 weeks of unpaid leaves for the occasions addressed in the statutes, nor could these clauses deny health insurance coverage during the 12 weeks granted by law to eligible employees. Clauses which did not provide these minimum levels of benefits thus became void and unenforceable. Similarly, no contract could preclude an otherwise eligible employee from using FMLA or FLA designated leave. It has also been clear that negotiated agreements could provide benefits that exceeded the statutory minimum and that the statutes were not intended to reduce benefits currently provided through negotiated labor agreements.

However, the negotiability of the impact of the family leave acts on contractual benefits has been less than clear and has led to a number of complex questions. For example, can a contract require an employee to choose one of two options: leave as provided under the law or the terms provided by the contract? Can that employee's choice serve as a waiver of eligibility for the nonselected leave? Can a board unilaterally determine that time spent

on contractual leave will also be charged against statutory leave? And, finally, can a board unilaterally adopt policies and procedures to implement statutory leaves or are those procedures negotiable terms and conditions of employment? Neither statutes nor regulations address these difficult issues and their resolution has been left to the process of clarification and definition which resolves litigated disputes. Nearly a decade after the enactment of these laws, the process of defining New Jersey's scope of negotiations began to evolve.

Negotiability of Concurrent Use of Statutory and Contractual Leaves In *Lumberton Board of Education*,¹³ the court affirmed PERC's holding that the issue of "stacking" contractual leaves with statutory leave entitlements under the FMLA is mandatorily negotiable. This case involved a challenge to the board's refusal to negotiate over its new unilaterally adopted policy which precluded employees from adding their FMLA entitlement to leave time available under the contract but required that leave time would be counted concurrently. The court rejected the board's argument that the FMLA authorized boards to prevent extensions of locally available leaves by "stacking" time available under the law and thus preempted negotiations over that issue. Rather, the court found that the FMLA establishes a minimum level of leave time for certain situations, but did not preclude negotiations of terms that would extend statutory benefits. Thus, the court held that the law does not totally remove employer discretion and does not preempt negotiations over how and when that leave is to be taken. In other words, under the *Lumberton* decision, boards cannot refuse to negotiate over the issue of whether their eligible employees can, or cannot, "stack" their leave available under both the FMLA and the locally negotiated agreement.

Negotiability of Other Areas of Implementing Statutory Leave The *Lumberton* decision specifically and narrowly addressed the issue of "stacking" statutory and contractual benefits. However, it does not specifically determine the negotiability of other areas involved in the administration and implementation of either the state or federal statutes. As such, whether all areas of the law which grant discretion to boards of education will be seen to be mandatory topics of negotiations remains open to interpretation. However, the court's reasoning in *Lumberton* may provide some useful guidance.

In finding that the FMLA did not eliminate employers' discretion, the *Lumberton* court cited two provisions of the federal law which state that nothing in the statute should be construed to "diminish the obligation of an employer to comply with any collective bargaining agreement" or to "discourage employers from adopting or retaining leave policies more generous" than the requirements of the Act.¹⁴ The court thus concluded that these

¹³ *Lumberton Education Association v. Lumberton Board of Education*, App. Div. Dkt. No. A-1328-01T5, decided October 8, 2002.

¹⁴ 29 U.S.C.A. § 2652 (a), § 2653. (Note that similar provisions appear in New Jersey's Family Leave Act. at N.J.S.A. 34:11B-14.)

provisions “evinced an intent on the part of Congress that the exact nature of the implementation of the FLMA would be the subject of negotiations when employees are covered” by a collective negotiations contract. It is, therefore, possible that other areas in which employers are granted discretionary authority will also be found to mandatorily negotiable. However, as this issue is likely to be further clarified and defined by subsequent decisions, boards would be well-advised to consult with their legal and labor relations resources.¹⁵

Negotiations Implications of the Family Leave Acts

The issue of employee leaves has been a well-established mandatory topic of negotiations for many years. The *Lumberton* decision adds another factor to these negotiations by establishing a duty to negotiate, at least over the issue of “stacking” leave, that is specifically related to employees’ statutory entitlements. Subsequent decisions are likely to result in a further definition of boards’ negotiations obligation under the FMLA and the FLA. During this evolutionary process, boards need to keep in mind that these new topics do not change the well-established principle that the duty to negotiate does not involve an obligation to concede. To quote the *Lumberton* decision:

The determination that the Board must negotiate with the ... (Association) does not mandate that the Board must adopt a more expansive leave policy towards the covered employees. However, the Board does have to negotiate the issue with the ... (Association).

Boards also need to remember that their negotiations positions in the area of disability and child care leaves, like their other bargaining positions, must be based on their identified district needs and must involve their commitment to advocating and pursuing conditions that protect their districts’ interests. In this task, boards will want to consider a number of factors, including whether they have a duty to negotiate and, if so, what particular conditions will best benefit the district.

Triggering the Obligation to Negotiate The *Lumberton* decision does not mean that every board must seek negotiations over its district’s approach to the coordination of statutory and contractual leave provisions. Since the enactment of the FLA and FLMA, many boards of education have adopted policies and practices to govern their districts’ implementation of these laws. The *Lumberton* decision does not invalidate existing district approaches to the “stacking” of these leaves. In fact, policies and practices that have been applied consistently in the past to grant and coordinate statutory and contractual leave benefits, without challenge from the local association,

can be said to represent current rules of employment which are mutually accepted by both parties and do not need additional union agreement or confirmation. In other words, the continuation of existing approaches does not require negotiations. However, under *Lumberton*, a new approach, or a change in an existing district practice, to the stacking of statutory and contractual leave, whether sought by the union or the board, would be a negotiable issue. Desired changes in other areas of administering FMLA and FLA benefits may also be negotiable. Boards should seek the advice and recommendation of their legal and labor resources before raising or responding to these type of bargaining proposals.

Negotiations of “Stacking” Leave Entitlements

It is important for boards to anticipate and avoid the possibility of extended and prolonged leaves of absence that can result from employees’ use of contractual leave and subsequent use of statutory leave. Therefore, it would be advisable for boards that do not have that right under existing policies or binding past practices, to obtain language that clearly states that time spent on contractual leave will also be charged to the time available to the employee under the state and federal statute. In return for this type of agreement, boards must provide the employee eligible for statutory leave with at least 12 weeks of continued health insurance coverage required by the acts.

This can be achieved by including this type of language in both the Disability and Child Care sections of a Maternity Leave provision. Concurrent use of contractual and statutory leaves can also be stated in one clause, at the beginning of the article, that is clearly applicable to all aspects of a “Maternity Leave” article, including child care for an adopted child and paternity leave.

Boards should also keep in mind that FMLA and FLA leaves also interact with other types of contractual leaves. For example, leaves under the acts are also available for the care and illness of a family member and leave for personal illness is also granted under the FMLA. It will therefore, be important to repeat the “concurrent use” language under all contractual provisions which address leaves guaranteed by the laws. In the absence of these inclusion, an arbitrator is likely to find that the “no stacking” language was not intended to apply to provisions other than Maternity Leaves.

An alternative, and possibly easier, approach is to include a “concurrent use” clause at the beginning of articles on Temporary and Extended Leaves and to assure that this language is clearly and unequivocally applicable to all leaves granted under the contract.

Negotiating Controls Over the Commencement and Termination of Leaves

Boards cannot control their employees’ needs for pregnancy related disabilities or child care leaves. However, boards can negotiate provisions that

¹⁵ New developments in this area will be posted on the Labor Relations page of the NJSBA web site at www.njsba.org.

preserve educational continuity by providing a degree of control over the commencement and termination of these leaves.

Pregnancy-Related Disabilities In a pregnancy related disability, it is presumed that a teacher will be disabled and need leave for one month before and one month after delivery. Thus, if a teacher anticipates a two-month disability to begin on October 25, the board may want to reduce disruption to the student's educational program and have the right to require the teacher to take an involuntary leave starting at the beginning of the first semester and ending at the beginning of the second semester. In accordance with school law decisions,¹⁶ employees placed on unpaid involuntary leaves are entitled to paid use of their unused accumulated sick days, and continued health insurance coverage, during their period of actual or presumed disability. Note, however, that whatever control is achieved for pregnancy related disabilities must be equally applicable to all anticipated disability leaves.

Child Care Leaves Prior to the enactment of the family leave laws, the timing of a child care leave was completely negotiable. Thus, school employees' contracts frequently contained provisions that were protective of the boards' needs for continuity of instruction. These provisions typically linked the beginning of child care leaves to the immediate end of the pregnancy related disability leave or to the date of the adoption and used school-related dates (such as the beginning of a semester or a marking period), to define the termination of the leave. However, this issue has become more complicated under the family leave laws.

The New Jersey law permits eligible employees to begin to take child care leave anytime within one year of the birth. Under this provision, an employee could request 12 weeks of leave at any time during the first year following the birth of a child. Since this is a legal right, boards could not insist that employees schedule their FLA leaves at a time that is more suitable to the school calendar or to the needs of the students. However, this does not mean that boards have lost all ability to control the timing of their contractual child care leaves.

Boards can negotiate contractual child care leaves that are more generous than those provided under the law. These contractual leaves cannot prevent employees from exercising their rights under statutes. However, contractual leaves can offer additional benefits to employees who schedule their leaves in accordance with negotiated requirements specifically designed to reduce disruptions to the instructional program or to otherwise meet the district's needs. Contractual leave that hold greater benefits than those available under the law may induce employees to take leave under the contract, rather than under the more limited FLA provisions. Providing health insurance coverage for more than 12 weeks is but one

example of possible additional contractual benefits that can be negotiated. This approach to contractual provisions, however, must also assure that leave taken under the contract will also count towards the employees' 12 week entitlement under the family leave acts. Without this type of language, employees could tack on their state entitlements upon the conclusion of their contractual leave.

Boards may also have an additional option to control employees' timing of a child care leave. In recognition of the importance of educational continuity, federal regulations contain special provisions for school districts and instructional employees. 29 CFR § 825.602 (a) provides employers with the option of requiring, under certain circumstances, that instructional employees who request a child care leave under the FMLA to wait until the next semester rather than begin the leave in the last three weeks of a semester.

The regulations also permit a school board to require employees to return at the beginning of a semester if their child care leave is scheduled to end within the last three weeks of a semester.

At this point, it is unclear whether New Jersey school boards can utilize this federal exception or whether these provisions would be seen to be less generous than the state law and thus inapplicable in New Jersey. Boards may therefore be well served, and well protected, by seeking beneficial commencement and return dates to their contractual leaves. Obtaining administrative flexibility in scheduling contractual leaves may require board concessions in other areas in order to achieve the desired provision. Each board, then, will need to determine the value of a potential trade to the operation of their schools.

Negotiating Retention of Statutory Discretion As discussed earlier in this article, many areas of both the state and federal laws are unclear. What aspects of administering the laws will be found to be mandatorily negotiable remain largely undefined. Boards may thus want to consider the advisability of negotiating protective language which retains their ability to exercise all the discretionary rights and authority provided to school districts by the FMLA, FLA and their regulations without additional negotiations. This type of language may be read by an arbitrator and PERC to constitute a valid waiver of the union's right to negotiate over these issues during the life of an existing contract. Keep in mind, however, that at this point in time we do not know whether this type of language will meet PERC's standards of a "clear and unequivocal" waiver of the union's right to negotiate over a recently declared topic of negotiations. Again, each board will need to assess the advisability, achievability, and importance of attempting to contractually retain the right to exercise all aspects of its discretionary authority granted by the family leave acts.

¹⁶ See *Denes, supra* and *Boyle, supra*.

Preparing for Negotiations: Analyzing Contractual Provisions and Proposals

In preparing for negotiations, boards are well advised to carefully review their policies, negotiated provisions and binding past practices on both pregnancy disability and child care leaves. Boards must keep in mind that, regardless of their contractual provisions, the actual administration of their disability and child care leaves must comport with the state of the law.

A board's review of its existing provisions and practices must focus on protecting management's discretion and in retaining the ability to preserve educational continuity, within the limits established by legal requirements. Any area that is deemed to interfere with administrative flexibility, educational or staffing needs should then be considered as an item in need of change and a possible topic for a board proposal in upcoming negotiations. Looking at the following components, in conjunction with the section on "Negotiations Implications of the Family Leave Acts" earlier in this article, can help boards to determine the strength and weaknesses of an existing or proposed article on Maternity Leave.

Components of an Anticipated Pregnancy-Related Disability Leave Clause

In reviewing a pregnancy related disability leave clause, boards should keep in mind that these provisions cannot result in discriminatory or disparate treatment of these disabilities and must parallel the conditions of leaves for other types of anticipated disabilities. The only permissible deviation from this principle is the automatic presumption of disability attached to an anticipated delivery date.

Boards' review of these clauses should also focus on the following typical components that are important to the effective administration and processing of disability leaves.

Notice and Application Procedures These aspects of the clause are important to the administration's ability to anticipate and plan the educational program and emerging staffing needs. Typically, employees are required to provide notice of their anticipated disabilities as soon as possible.

Verification of Disability Every anticipated disability should require a doctor's verification. In pregnancy related disabilities, a non-specific doctor's note indicating the anticipated delivery date is sufficient verification for the period of presumed disability. Should an employee need additional time, or if the board believes that the individual is not physically able to perform the responsibility of the job, additional verification may be required by the board.

Control of Commencement and Termination of Leaves The ability to control the timing of an anticipated

disability leave is important to limiting disruption to the school's operations. A clear statement of the board's right to place an employee on an involuntary leave of absence to preserve educational continuity, or to meet other district needs, is advantageous to the management of the district. This condition must also be applicable to all anticipated disability leaves. Employees placed on involuntary leaves are eligible to use their unused accumulated sick days during the period of actual disability.

Coordination of Statutory and Contractual Leave

This component provides boards with additional control of the administration of employees' entitlement to disability leaves. A clear statement that leave for all anticipated disabilities will also count towards eligible employees' entitlement to FMLA leave provides clear guidance and is beneficial to the administration.

Components of Child Care Leaves

In reviewing their child care leave provisions, boards must keep in mind that these leaves must be equally available to female and male employees on a nondiscriminatory manner. Boards' review of these clauses should also focus on the following typical components that are important to the effective administration and processing of disability leaves.

Eligibility for Leave While remaining gender neutral, eligibility for child care leave is, for the most part, negotiable. Different types of leaves can be offered to tenured and nontenured staff. It is not unusual for contracts to limit the length of a nontenured employee's child care leave to the end of the employee's annual contract. Boards must also keep in mind that, regardless of their tenure status, employees may also be eligible for child care leave under both the federal and state family leave acts.

Coordination of Statutory and Contractual Leave

Provisions that coordinate statutory and contractual leave entitlements are particularly important to the administration of child care leaves. In addition to contractual leaves, employees may be eligible for child care leave under both the state and federal family leave acts. Unless the contract (or a binding past practice or board policy) clearly specify that time spent on child care leave will count towards both contractual and all statutory entitlements, employees could be entitled to "stack" their leave time. This could result in an unintended employee entitlement of adding 24 weeks of leave to the contractually authorized time. Thus, boards must carefully determine whether their contract language and/or actual policies and practices insulate the district from the possibly negative consequences of "stacking" leave entitlements.

Notice and Application Procedures As in the disability section of this leave, these aspects of the clause are important to the administration's ability to anticipate

and plan the educational program and to meet its staffing needs. However, boards are bound by the minimum notice provisions established by statutes. Similarly, boards cannot modify the requirement of New Jersey law that this leave must be equally available to both parents and which permits two parents employed by the same district to take FLA leave at the same time. However, boards can strive to obtain reasonable procedures for contractual leaves that can be effective in minimizing disruptions in district operations and otherwise meet their districts' needs.

Commencement and Return Dates Given employees' rights under the FLA, boards should consider the possibilities of provisions that encourage employees to schedule their child care leaves to coincide with the school calendar. Boards cannot negotiate provisions that interfere with their employees' rights under the law. Boards can, however, agree that employees could have a 12 week leave, with benefits, under the law or a longer contractual leave. This type of negotiated leave, while counting against the FLA and FMLA entitlements, would also provide additional benefits as long the employee returned at a specific point in time. Alternatively, or in addition, boards may also want to preserve their authority under the FMLA to reduce disruptions to the students' educational experience by adjusting the starting and ending times of child care leaves occurring at the end of an academic semester.

Procedures for Granting and/or Renewing Leaves Boards should avoid language that specifies that they "shall grant" requests for leaves or renewals of such leaves. Particularly in the area of renewals, boards are far better served by language that authorizes board discretion (such as "may grant or deny") in the handling of requests for leaves and permits considerations of the district's needs.

Eligibility for Multiple Utilization of Leaves Many boards have been troubled by contract language that permits employees who have just returned from a child care leave to become immediately eligible for another similar leave for the anticipated birth or adoption of another child. Other boards believe that, as educational leaders, they should not interfere with parents' ability to be home with the new addition to their family. As in so many other areas of contractual provisions, boards must assure that their contract language reflects their districts' local goals.

In addition, boards should also keep in mind that the FMLA and the FLA both limit the amount of leave time available in a given period. Contractual leave which offers the possibility of multiple child care leaves may provide an additional benefit and serve as an incentive to take contractual, rather than, statutory leave.

Continuation of Benefits While on Leave The issue of continuation of benefits, not governed by statutes, is negotiable. To assure compliance with the law, and to support concurrent use of contractual and statutory benefits, this benefit should be incorporated into

contractual leaves. However, since both the federal and state law permit the negotiations of additional benefits, boards will also want to consider the possible advantages of negotiating a contractual option which gives employees more generous benefits than available under the acts. For example, such provisions could authorize more than 12 weeks of paid health insurance, the ability to extend the leave upon the board's approval, the availability of tuition reimbursement or the accrual of other benefits, or any other approach that is acceptable to the local board. Conditions for this contractual benefit would, of course, include an agreement that the time would count towards leave under the statutes and would involve a return date that is reasonably related to the district's needs.

Conditions for Guide Placement Upon Return from Leave Many contracts specify that advancement on the guide will be available upon return from leave if the employee worked a minimum number of days before going on leave. This can prove to be detrimental to boards of education as it can be read as an indication that advancement on the guide is automatically governed by years of experience or to guarantee guide advancement under any condition. Since guide placement is a matter of negotiations, this type of language could interfere, or complicate, boards' ability to design and administer new approaches to the structure of their salary guides. Boards would be better served by language that simply stated that teachers would be placed on the guide in accordance with the district's negotiated procedure.

Application of Components

The following clauses recognize the state of the law and use the components described above to protect the interests of most school boards in the granting of disability and child care leaves. These clauses are not an unconditional endorsement of the language that follows, but are simply an illustration of the possible development of components of the disability and child care portions of a contractual extended leave article provision benefits. Your clauses, and your proposals, should be examined and developed to reflect your local district's needs and goals for these types of leaves.

Extended Leaves of Absence

A. Extended Leaves of Absence

1. *Whenever applicable, all extended leaves under this article shall be counted and run concurrently with leave available for the same circumstances under federal and state statutes.*
2. *Employees requesting extended leaves shall be informed of their eligibility for leave under the law and this agreement.*
3. *The Board reserves the right to exercise its discretion granted under law to adjust extended*

leaves of absence to avoid disruptions in the instructional program or other school operations.

B. Disability Leaves

- 1.** *An employee who anticipates a disability shall, if possible, notify his/her immediate supervisor in writing at least 90 days prior to the anticipated commencement of the disability or as soon as the employee knows of it. In the case of pregnancy, the employee shall inform the supervisor of the anticipated delivery date.*
- 2.** *During the period of disability, an employee shall be entitled to accumulated sick leave and benefits as required under law. Time spent on paid disability leave shall be counted concurrently with unpaid time available under law.*
- 3.** *The Board of Education reserves the right to regulate the commencement and termination dates of anticipated disability leaves in order to preserve educational continuity and/or to meet other district needs.*
 - a)** *An employee who is placed on an involuntary unpaid leave shall be entitled to all sick leave and insurance benefits during the period of actual or presumed disability, according to law, the negotiated agreement and the rules of the insurance carrier.*
 - b)** *The period of disability which occurs during an involuntary leave shall also be credited towards time available under law. Except as otherwise required under statutes, no benefits shall accrue during time spent on unpaid leave.*

C. Child Care Leaves

1. Procedures:

- a)** *Child care leave without pay is available to eligible employees either through statutes or through section 3 of this article.*
- b)** *Employees desiring a child care leave shall notify their supervisor of their intent no less than 90 calendar days before the anticipated delivery date. In the case of adoption, employees shall notify their supervisor when application for the adoption is made.*
- c)** *Employees applying for child care leave shall be informed of their entitlements under statutes and under the contract. Employees seeking child care leave shall inform their supervisor of their selection of contractual or statutory leave and file a formal written application, as soon as possible, but not less than 30 days prior to the*

anticipated delivery date. In the case of adoption, employees shall file their formal application and their request for a specific leave period as soon as the employee is notified of the date of custody.

- d)** *Upon return from child care leave, an employee who actively worked at least 90 days in a school year that the leave commences or terminates shall have the full year credited for sabbatical and longevity benefits. Placement on the salary guide will be in accordance with negotiated procedures.*
- 2. Statutory Leave:** *Child care leave is available to eligible employees either under the federal Family and Medical Leave Act (FMLA) or New Jersey's Family Leave Act (FLA).*
 - a)** *Leave time taken under statutory entitlements cannot be stacked or taken consecutively but shall be counted concurrently as time available under both the FMLA and the FLA.*
 - b)** *Conditions for statutory leave (eligibility, time available, benefits, etc.) will be in accordance with legal requirements. The Board reserves the right to exercise its discretion granted under statutes and regulations to adjust extended leaves of absence to avoid disruptions in the instructional program or other school operations.*
 - c)** *Employees who opt for statutory leave shall not be eligible for contractual leave under section 3 of this article.*
- 3. Contractual Leave:**
 - a)** *Contractual child care leave shall begin at the following time:*
 - 1)** *immediately upon the termination of the disability leave defined above; or*
 - 2)** *immediately after the birth of a child or, in the case of adoption, immediately upon custody of the child; or*
 - 3)** *at the beginning of a scheduled school semester.*
 - b)** *Time spent on contractual leave shall count towards the time granted for child care leave under both the state and federal statutes.*
 - c)** *Nontenured employees' child care leaves shall terminate at the end of the school year in which the leave began.*
 - d)** *Tenured employees may request child care leaves that include the full following aca-*

demic year and that terminate at the start of the work year in which the employee is scheduled to return to active employment.

- e) In situations where both parents are employed by the Board, only one parent will be eligible for contractual leave. The Board of Education will consider exceptions on a case-by-case basis and adjustments shall be at the full discretion of the board.*
- f) Employees shall not be eligible for a new contractual child care leave until they have returned to active employment for at least ____ full school years.*
- g) Approval of contractual leave is conditioned upon adequate staffing, instructional needs, and operational needs as determined by the board of education. No request will be disapproved arbitrarily, discriminatorily or capriciously.*
- h) An employee on a contractual leave of absence shall be eligible to receive and/or accrue benefits, including insurance coverage, as statutorily required or otherwise specifically provided in this agreement.*

4. Extensions

- a) Employees may request extensions or other adjustments to the duration and conditions of leaves defined above.*

- b) The Board of Education will consider requested exemptions on a case-by-case basis and adjustments shall be at the full discretion of the Board and shall not be subject to arbitration.*

Boards may be well served to seek beneficial commencement and return dates to their contractual leaves. Obtaining administrative flexibility in scheduling of the contractual alternative, may require board concessions in other areas in order to achieve the provision in negotiations and to make the alternative attractive to employees.

Summary

The administration of maternity leave provisions can be facilitated by dividing the leave into two components: a disability leave for the purpose of accommodating the pregnancy related disability; and an unpaid leave for the post-delivery purposes of child care. Eligibility for disability leave is governed by statute and case law. All pregnant employees must be permitted to use their accumulated sick leave days for a pregnancy related disability under the same conditions which are applicable to all other anticipated disabilities. Within the requirements