



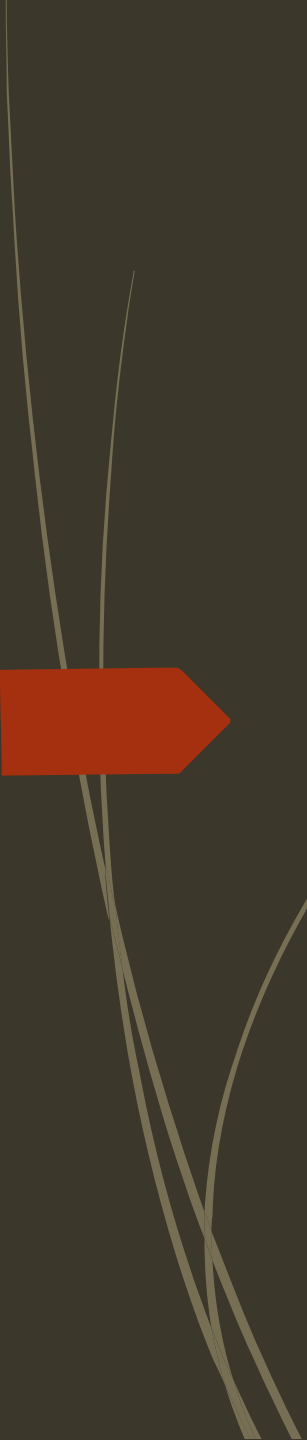
Responding to Employee Attendance Issues

OSPA Winter Retreat

February 27, 2024

Challenges With Addressing Attendance

- There are many statutes, each with its own complex set of rules and requirements.
- Leave situations are highly personal - they involve some of the most impactful situations, including health emergencies, once-in-a-lifetime events and the death of a loved one.
- There is a growing sense of entitlement - I should be paid in every instance when I am absent or I'm being treated unfairly.
- There can be inconsistent application of the rules from one supervisor to the next, or even by the same supervisor.
- In many instances it is impossible to prove that someone is abusing leave.



Managing Employee Leaves and Absences

The majority of districts in the state are grappling with a staggering number of employee absences along with a shortage of available substitutes. The result has been unfilled positions and people throughout the system serving as subs in positions well outside their job description. One of the main factors that contributes to the attendance problem is the abundance of leave opportunities available to school employees. In order for an employee to be absent without suffering consequences, there must be some basis for that absence. An effective response to employee attendance issues involves both managing leaves as well as responding to abuse.

- Where does the right to leave originate?
- How do I avoid making the problem worse?
- Dealing with common attendance scenarios
- Can we still hold people accountable for attendance?



Employee Leaves – Is there a contractual source?

1. Sick Leave/Time

The primary source of contractual leave for school employees is actually a combination of a contractual leave and two statutory leaves. School district employees were among the first to be afforded paid sick leave, initially for their own illness/injury and then eventually for a wider variety of reasons.

- Districts must comply with both ORS 332.507 and ORS 653.601.
- ORS 332.507 allows for use of ten days (or one day per month worked) of sick leave/time for personal illness or injury.
- ORS 653.616(6)(b) allows for the use of sick time for a variety of reasons, including illness/injury of a family member.



Sick Leave - Common Issues

- ▶ The statute provides no definition for "month worked" for purposes of determining when an employee who works during the summer has earned an additional day.
- ▶ Sick leave under ORS 332.507 accumulates at an unlimited amount but leave transferred from another district can be limited to 75 days.
- ▶ If sick leave is allowed to be taken for all of the reasons set forth in the Oregon Sick Time Law, then a contractual sick leave provision that is based off of ORS 332.507 will satisfy the requirements of ORS 653.616(6)(b) as well.



How do I address possible abuses of contractual leave?

What does your contract say about requiring medical verification?

- How many consecutive days must an employee be gone before you can require medical verification?
- Do you have the ability to require verification when there is a questionable pattern or practice of leave usage? What does that look like?
- What about when the employee returns from leave? Any limitations on that?



Employee Leaves – Is there a contractual source?

2. Sick Leave Bank

Many contracts have sick leave banks that provide for leave for an employee once they exhaust contractual sick leave. Typically, however, sick leave banks have internal requirements that limit usage to major medical situations or life threatening scenarios. It is also rare for a sick leave bank to cover a family member's illness.

- Which party controls who leave from the bank is granted to?
- Did you expand the availability of leave from the bank through COVID MOU bargaining?
- Is there a limit on how much leave the bank can grant in a year?



Employee Leaves – Is there a contractual source?

3. Personal Leave

Nearly every licensed contract, and most classified contracts contain between one and five days of personal leave that can be used by staff. While most districts do not or cannot control the reasons for the usage of such leave, many contracts contain internal controls to prevent mass absences on certain days.

- Granting of leave contingent on the availability of subs
- Use of personal leave limited to a certain number of percentage of staff using such leave on a given day
- Administrator discretion in allowing the use of leave
- Personal leave “buy back” provisions



Other Common Contractual Leaves

Bereavement Leave
(Which is also a
statutory leave
under OFLA)

Emergency Leave

Family Illness Leave
(Which is also a
statutory leave
under several
statutes)


Professional Study
Leave

Legal Leave

Military Leave
(Which is also a
statutory leave)

Employee Leaves – Is there a statutory source?

Regardless of whether an employee has a right to be absent that is grounded in the CBA, there may be an independent basis for leave set forth in state or federal law. Often those statutes provide only for unpaid leave, but it may typically become paid leave if an employee has contractual leave balances. Other forms of statutory leave are paid, or at least partially so. Many of these statutes have a regulatory scheme that makes holding employees accountable for attendance difficult.




Employee Leaves – Is there a statutory source?

1. Oregon Family Leave Act

The Oregon Family Leave Act continues to provide unpaid leave for a variety of reasons, including the serious health condition of an employee or their family member, parental leave, sick child leave, and bereavement leave. If the employee has accrued paid leave, it may be utilized during an OFLA leave.

2. Family and Medical Leave Act

The federal counterpart, it varies just enough in terms of eligibility and benefits afforded to make application alongside OFLA challenging.



Employee Leaves – Is there a statutory source?


3. Americans with Disabilities Act

While not in and of itself a leave statute, unpaid leave may sometimes be considered a reasonable accommodation for an employee with a disability. Particularly when an employee is out of other statutory leave, you may have to determine whether granting unpaid leave would amount to an undue hardship.

4. Workers' Compensation

An employee who suffers an on-the-job injury has a right to be absent as well as a lengthy right to re-employment. While the leave is not technically paid by the employer, there is a direct economic impact.

- More and more employees have asserted mental health issues arising from the workplace, leading to workers' comp claims.
- Some unions have been proposing that the district should be responsible for keeping them in paid status for the waiting period before benefits begin.



Employee Leaves – Is there a statutory source?

5. Oregon Paid Family Leave

Having arrived in September of 2023, the Oregon Family and Medical Leave Insurance Program provides 12 weeks of paid leave for the following:

- Birth or adoption of a child
- Employee's own medical condition
- Family member's serious health condition
- Issues related to domestic violence, harassment, sexual assault or stalking

The amount of pay is less than the employee's full salary, although the employer may allow the employee to make up the difference with accrued paid leave.



What to do?

Given the presence of all these sources of leaves, it is no wonder that holding employees accountable for attendance is so difficult that some employers simply give up. You can, however, put yourself in a better position to address at least the most egregious situations.

- ❖ Don't worsen your situation at the bargaining table.
- ❖ How to deal with some common attendance-related situations.
- ❖ Establishing effective practices.



Don't Make Your Attendance Situation Worse Through Bargaining

Public school employees are eligible for a myriad of contractual and statutory leaves, perhaps more than in any other industry. So why do we bargain more leave into the collective bargaining agreement?

Union will proposals will inevitably seek to create:

- More days of an existing leave
- New leave categories
- Fewer/no restrictions on the use of leaves
- Employer picks up the cost



Don't Create New Leave Categories

The following are examples of non-required leave categories that are commonly proposed (and sometimes agreed to!):

- **Sub-deduct Leave** - This is typically leave, often sick leave, that can be taken once paid sick leave is exhausted and that is at a reduced rate, most often the employee's rate minus the cost of the sub. There is no statutory basis for this leave and no reason to agree to it given the presence of OFLA/FMLA and PLO.
- **Paid Family Leave** - Once common before the creation of the numerous statutory leaves (most recently PLO) and the ability to use sick leave for family illness purposes. Now, it should be considered duplicative.
- **Emergency Leave** - Fairly common in CBAs, but what "emergency" is not covered by another existing leave or perhaps a situation of the employee's own making?



Beware the expansion of existing leaves.

- ▶ **Bereavement Leave Expansion:** While it is difficult to bargain hard over bereavement leave without looking cold and heartless, should the taxpayers really be responsible for having a school employee's pet bereavement? And while we can all think of many friends who we would feel it was appropriate to take bereavement for, if we add that to the existing group of eligible individuals is it even remotely possible to hold an employee accountable who wants to abuse that leave?
- ▶ **"Mental Health" Days:** We all take them. Sometimes you need to go skiing or head to the beach for the day in order to stay feeling sane. But is this an appropriate use of sick leave? Isn't this just actually personal leave? While you don't want to be the leave police, when someone posts photos from Mt. Hood and you know they put in for sick leave, you don't want a contractual barrier to addressing the issue.
- ▶ **Additional days of sick leave** - a pandemic relic that has now found its way into bargaining proposals.

Shouldn't we just make it all "PTO?"

Who wants to be scrutinizing employees' use of leave? What if we just said you have a certain amount of leave days in a year, use them how you like?

- A PTO system treats all types of leave as a right that should be used regardless of need instead of recognizing some leaves as only being appropriate on an as-needed basis.
- More employees will exhaust all of their leave each year, making it increasingly likely that they will turn to leave banks or seek unpaid leave.
- Attendance and sub availability will be even more of a challenge during those peak usage times.
- Some employees actually treat their sick leave like an insurance policy and use other leaves only when appropriate; removing all restrictions for the entire pool of leaves will cause these responsible leave users to be more likely to be gone more.
- Districts are required to track and report accumulated sick leave to PERS. If you give twenty days of PTO each year, how much of that is sick leave? How do you track whether a given absence is related to sick leave or not? This is especially problematic with CBAs that buyback sick leave at retirement.



Bargaining Practice Tips

- ▶ Tie proposals for additional leave back to other union proposals that are contradictory, such as proposals to prohibit or limit certain employees from being made to cover for absent colleagues.
- ▶ Be prepared with actual data of leave usage. It is difficult for the union to claim that their members all use leave responsibly when presented with a chart showing the amount of sick leave (or even bereavement leave) that is used on Fridays in May.
- ▶ Always remember that once you allow a new leave category or an expansion of an existing leave into the contract, it will be very difficult, if not impossible to get it out. As an example, some CBAs still include sabbatical leave provisions, despite the fact that such a program is not economically feasible and typically hasn't been allowed in decades.



Common Attendance Situations - The No Show

You hired a new employee and they report for work on the first day. After a couple of days, they simply stop showing up. They burn through all of their front-loaded leaves, which they haven't yet earned, and don't answer your calls or emails. At this point, they haven't shown up for a week. You can just separate from employment and declare it "job abandonment" right?



Common Attendance Situations - The Convenient Illness

Your employee requests to use personal leave on Friday because their child is in the state baseball playoffs. Given the fact that it's a Friday in May and you are having severe substitute challenges, you decline the request. (You must be lucky enough to have the ability to deny a personal leave request in your CBA.) On Friday, by sheer coincidence, the employee happens to fall ill and reports their absence as sick leave. Clearly, they are lying, right? And clearly you can discipline them, right?



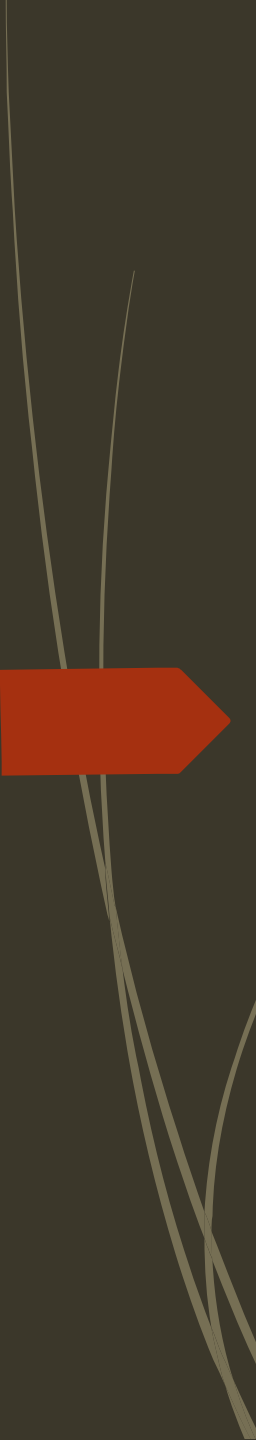
Common Attendance Situations - Reduced Work Schedule

You have a brand-new employee who hasn't worked long enough to become eligible for FMLA. The employee, who is on the maintenance crew, complains frequently about her back pain. It gets to the point that she begins missing work, soon exhausting her sick leave. When she returns from her latest leave, she brings you a doctor's note saying that if she can just drop down to half-days, her back will be fine and she will not need to miss work. Do you have to let her work a half-day schedule? Why or why not?



Common Attendance Situations - All Out of Leave

You have an employee who has been with the district for over thirty years as a custodian. Over the past couple of years you've started to question whether he can really get the job done. You find him sitting down for much of his shift and he seems to really be laboring. His sick leave usage has increased to the point that he no longer has any left. A few months ago, he injured his shoulder and utilized OFLA as well as Paid Leave Oregon. Since his exhaustion of those leave, his attendance has continued to be spotty, and now he tells you that he needs to take a few weeks off due to his shoulder. Can you terminate him?



How to address employee absences

- Educate supervisors on the CBA and statutory leave provisions.
- Utilize contractual limitations for the granting of personal leave.
- Recognize employees who have maintained good attendance, particularly during the pandemic.
- Strive for organization consistency to avoid discrimination claims and challenges to discipline.
- At the beginning of each year, inform staff that you will be monitoring attendance and checking in with employees individually throughout the year.
- Do not let attendance issues slide – utilize available evaluation and/or disciplinary processes.
- Do not create an environment where periodic unpaid leave is seen as an option by employees.