



Dear Superintendent/policy contact:

Thank you for your hard work educating Missouri's children. The MSBA Policy Department is proud to partner with you in your important work.

I want to bring to your attention a new, potentially legal issue for your district. The **Pregnant Workers Fairness Act** was passed in 2023, and new regulations went into effect this summer. MSBA is adjusting language in your leave policies to align with this new law in your latest policy update. However, this law may have some impact on sick leave pool or sick leave bank policies as well, depending on how they are written and implemented in your district.

MSBA does not recommend that districts adopt sick leave pool or bank policies, but we assist districts that have custom policies. We recognize that it is sometimes politically difficult to remove or modify such a benefit. In addition, districts frequently have practices that are not included in their board-adopted policy manual, or districts have forgotten to update their policies to reflect current practice. Some districts have stopped using a sick leave pool or bank but have forgotten to rescind the policy. This makes it challenging for MSBA to assist districts with legal compliance.

If your district has a sick leave pool or sick leave bank policy or practice, MSBA is encouraging your district to take some time to review it now. MSBA is particularly concerned about the following issues:

1. **Pregnancy, Childbirth, or Related Conditions:** If the district offers additional paid leave through a pool or bank for illnesses and injuries that prevent employees from working, the district will need to offer the same leave for absences due to pregnancy, childbirth, and related conditions that also prevent the employees from working. See Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 and the Pregnant Worker's Fairness Act (PWFA).

In addition, the PWFA requires employers to provide reasonable accommodations to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions unless it would cause an "undue hardship." The Equal Employment Opportunity Commission's regulations note one example of a PWFA accommodation as an employer "permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) ..." 29 CFR §1636.3(i)(2) (emphasis added). It is currently unclear how broad this new law will be interpreted, but districts may need to consider waiving some policy requirements as a reasonable accommodation in some situations. MSBA highly recommends that administrators who oversee sick leave pools and banks receive additional training on this new law to ensure that no inadvertent violations occur.

2. **Illegal Discrimination:** Whenever there is discretion, there is room for illegal discrimination. Policies with loose definitions of "a serious health condition" are



particularly ripe for claims of discrimination based on a disability if a committee or administrator must make case-by-case decisions on which conditions qualify for additional paid leave and which do not. If your district's policy does not give clear, nondiscriminatory guidance on this issue, the district's practices could result in litigation. MSBA recommends that districts rely on the definition of a "serious health condition" under the Family and Medical Leave Act as a neutral condition of the leave.

3. **Confidentiality:** The Americans with Disabilities Act and the Family and Medical Leave Act have strict rules on the confidentiality of medical information regarding employees, including who that information can be shared with. Any policy or practice that allows this sensitive information to be reviewed or considered by a committee or employees outside the human resources department is a legal concern.
4. **Coordination with FMLA:** Many districts forget about FMLA until all paid leave has been used. But FMLA needs to be formally designated by the district at the beginning of the leave to avoid stacking paid and unpaid leave obligations and to ensure that the district complies with its FMLA obligations promptly. If your policy does not align with your FMLA processes, it needs to be reviewed.
5. **Paperwork:** Both the FMLA and the PWFA limit what types of information the district can request from an employee, which sometimes conflicts with district policies and practices. For example, under the PWFA the district cannot delay providing a reasonable accommodation (which may include access to paid leave) because documentation has not been provided. This could occur if under the circumstances the documentation is not necessary to determine whether the employee has a condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The district cannot require more documentation than is allowed under the FMLA unless the district notifies the employee in writing that the additional information is not related to FMLA eligibility.
6. **Feasibility:** One of the issues with many policies is that there is no limit on the number of paid days an employee may receive. This might not be a problem for many illnesses, but some districts have had employees with terminal illnesses taking additional leave days for years and never returning to work. This is typically not the intent of these kinds of policies and can bankrupt the program. Is there a cap on the number of leave days an employee is entitled to receive under your policy?
7. **Clarity:** If you do not understand the policy, your employees do not either. The time to modify the policy is not when employees believe they are entitled to paid leave as that sometimes makes the decision more difficult and personal. Does your policy clearly indicate which employees may qualify to receive the leave? Could your policy be organized better?



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Please note that MSBA has a **sample sick leave pool policy** that we believe addresses some of these difficult issues. While we do not recommend districts adopt sick leave pool/bank policies, we would rather that you use our sample than try and write or rewrite a policy from scratch. Please contact your policy editor for a sample. If you would like MSBA to review your policy for legal compliance, please notify your policy editor as well. We are happy to help.

If you would like additional information on the PWFA, the U.S. Equal Employment Opportunity Commission has guidance at: <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>.

Sincerely,

Susan Goldammer